DOCUMENT RESUME

ED 148 958 95 UD 017 783

AUTHOR	Gaffney, Michael J.; And Others
TITLE	An Analysis of the Legal Framework for State Administration of Title I of the Elementary and Secondary Education Act of 1965.
INSTITUTION	Lawyers' Committee for Civil Rights Under Law, Washington, D.C.
SPONS AGENCY	National Inst. of Education (DHEW), Washington, D.C.
PUB DATE	Sep 77
CONTRACT	400-75-0081
NOTE	538p.; For a related document see UD 017 782
EDRS PRICE	MF-$1.00 HC-$28.79 Plus Postage.
DESCRIPTORS	*Compensatory Education Programs; *Educational Legislation; *Evaluation; *Federal Programs; *Government Role; Grants; *Laws
IDENTIFIERS	*Elementary Secondary Education Act Title I; Program Requirements

ABSTRACT

This volume presents an analysis of the legal framework for state administration of Title I of the Elementary and Secondary Education Act of 1965. The study's basic research objective is to determine what clarifications, additions, or deletions are needed in the present legal framework to improve program administration. More specifically, this paper, which is one of four papers prepared by the Legal Standards Project, is concerned with whether the legal requirements for state administration of Title I are set forth with adequate clarity, scope, and sufficiency and whether the legal framework adequately interrelated different functions State Educational Agencies (SEAs) must perform in the process of administering Title I. The paper includes the project findings with regard to the interrelationship between and among SEA functions and the legal requirements for administration of Title I. It also contains illustrative examples from different functional areas. Recommendations for specific additions, deletions or modifications to the federal legal framework are suggested. These recommendations are designed to improve the federal legal framework for state administration of Title I. (Author/AM)

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AN ANALYSIS OF THE LEGAL FRAMEWORK FOR STATE ADMINISTRATION OF TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965

Prepared by Michael J. Gaffney
Catherine Thomas
Robert Silverstein

With the Assistance Of

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U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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UD 017783

September, 1977

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The work upon which this paper is based was performed pursuant to contract 400-75-0081, with the National Institute of Education, United States Department of Health, Education and Welfare. It does not necessarily represent the views of the National Institute of Education or the United States Department of Health, Education and Welfare or any representative thereof. The statements made and the views expressed are those of the authors and do not necessarily reflect those of the Lawyers' Committee for Civil Rights Under Law.

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PART I
INTRODUCTION AND OVERVIEW OF THE PAPER

I. Purpose of the Paper

On April 11, 1965, Congress enacted the Elementary and Secondary Education Act[1] (ESEA) which was designed to expand educational opportunities in the nation's elementary and secondary schools. "Title I"[2] of that Act provides financial assistance to local educational agencies[3] (LEAs) to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families. Later amendments have "set aside" certain amounts of Title I funds, for handicapped children,[4] Indian children,[5] agricultural migrant children,[6] children in institutions for the neglected and delinquent children,[7] and children of migratory fishermen.[8]

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[1] P.L. 89-10 (20 U.S.C. 241a *et. seq.*).

[2] "Title I" of ESEA was originally designated "Title II" of P.L. 81-874 (1950) pertaining to federal aid to impacted areas. In January, 1968 Congress redesignated the enabling legislation as Title I of ESEA.

[3] The term "local educational agency" means a "public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools . . ."45 C.F.R. §116.1(r)(1975).

[4] P.L. 89-313 (November 1, 1965).

[5] P.L. 89-750 (November 3, 1966).

[6] *Id.*

[7] *Id.*

[8] P.L. 93-380 (August 21, 1974).

Congress, in the Education Amendments of 1974 (1974 Amendments), extended the Title I program through June 30, 1978. The 1974 Amendments also directed the National Institute of Education (NIE) to undertake a comprehensive study of compensatory education programs, including Title I, and to report the findings to Congress with recommendations concerning the future of federally funded compensatory and remedial education programs.[9]

The NIE study has several research components.[10] One of them is an examination of the administration of Title I by the states. This is an important subject because the Title I statute confers major responsibilities for the administration of Title I on State Education Agencies[11] (SEAs). Central to the study of program administration and to any conclusions concerning the future of federal compensatory education efforts is an understanding of the present legal framework of Title I. Since this legal framework includes program requirements which specify how Title I programs are to be designed and how federal funds are to be used by LEAs which receive Title I funds, it implicitly defines the objectives of state administration of Title I. The legal framework also includes specific functions which SEAs and the United States Office of Education (OE) are to perform in the administration of Title I.[12] The National Institute of Education has contracted with the Lawyers' Committee for Civil Rights Under Law to describe and analyze the legal framework of Title I and state compensatory education programs. The "Compensatory Education Study -- Survey of Legal Standards" has been conducted by the Legal Standards Project at the Lawyers' Committee.

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[9] Sec. 821 of the 1974 Amendments (20 U.S.C. 1221c).

[10] See Research Plan: Compensatory Education Study/National Institute of Education (December 6, 1974), and Interim Report No. 1 Compensatory Education Study/National Institute of Education, (August 1975), See also Evaluating Compensatory Education: An Interim Report of the NIE Compensatory Education Study, National Institute of Education (December 30, 1976).

[11] The term "State educational agency" means the officer or agency primarily responsible for the state supervision of public elementary and secondary schools. 45 C.F.R. §116.1 (aa)(1975).

In general, the study's basic research objective is to determine what clarifications, additions, or deletions are needed in the present legal framework to improve program administration.

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[12] The legal framework for state administration of Title I also includes certain provisions of the General Education Provisions Act (GEPA) (20 U.S.C. 1221 et seq.) and the GEPA regulations (45 C.F.R. Part 100b., State Administered Programs (1976)).

More specifically, this paper, which is one of four papers prepared by the Legal Standards Project,[13] is concerned with whether the legal requirements for state administration of Title I are set forth with adequate clarity, scope, and sufficiency and whether the legal framework adequately interrelates different functions SEAs must perform in the process of administering Title I.

II. Limitations of this Paper

There are several aspects of the Title I legal framework which will not be considered either in this paper or elsewhere in the Lawyers' Committee study. First, this paper will not describe or analyze state responsibilities relating to Title I programs funded from special Title I "set asides" for handicapped children, Indian children, agricultural migrant children, children of migratory fishermen, or children in state institutions for neglected and delinquent children.

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[13] The other papers prepared as part of the study by the Legal Standards Project are: (1) A Description of the Title I ESEA Legal Framework (September 1977); (2) An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965 (September 1977); and (3) A Description and Analysis of the Relationships Between Title I and Selected State Compensatory Education Programs (September 1977).

Second, this paper will not consider those sections of the legislation and regulations which relate to state responsibilities in such areas as special incentive grants or the operation of Title I programs in private schools. Each of these areas, though relevant, is beyond the scope of this study.

Third, this paper will not be concerned with the legal requirements establishing the maximum amounts of funds available for state administration of Title I.[14]

Fourth, this paper focuses on the legal framework for state administration, not the process or efficiency of state administration. Consequently this paper does not investigate purely administrative issues, e.g., organization and staffing of the Title I component of SEAs. This and other administrative considerations related to state administration of Title I are the subject of a separate study supported by NIE.[15]

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[14] Although the subject of the adequacy and sufficiency of the administrative set-aside for state administration of Title I will be addressed by another NIE contractor, we note that three previous studies of Title I have suggested that the administrative set-aside for state administration should be modified. See The Silken Purse: Legislative Recommendations for Title I of the Elementary and Secondary Education Act of 1965, The Planar Corporation (October 5, 1973); P. G. Briggs, A Perspective on Change: The Administration of Title I of the Elementary and Secondary Education Act of 1965, The Planar Corporation (October 31, 1973); and M. Wargo, et al., ESEA Title I: A Reanalysis and Synthesis of Evaluation Data from Fiscal Year 1965 Through 1970, American Institutes for Research in the Behavioral Sciences (March 1972).

Fifth, with respect to the analysis of the states' legal framework, it is important to note that the paper focuses on a content analysis of state policies and on interpretations of state policies by SEA Title I officials. Whether a particular state policy reflects actual practice is beyond the scope of the analysis. Thus, for example, the paper describes and analyzes only the content of a state's policy with respect to application approval. It does not evaluate whether in practice the SEA actually requires LEAs to comply with a particular policy. However, this limitation is not a deficiency. The analysis of the content of state policies offers valuable insights into the variety of possible interpretations of the federal requirements. It is also a useful source of ideas for improving and clarifying these requirements.

Sixth, on various occasions the limitations of our expertise prevented us from making specific recommendations in some technical areas, e.g., accounting, evaluation design. Where we felt that it would be inappropriate to make such recommendations, we have either limited our role to clearly identifying issues requiring further analysis and decisions by others or have not analyzed state policies in highly technical areas such as accounting.

15/ An NIE contract for a "Compensatory Education Study: Research on Administration of Title I" has been let to Booz, Allen & Hamilton, Inc. and the Syracuse University Research Corporation.

III. Research Methodology

To achieve the basic research objectives, the Legal Standards Project studied the federal Title I legal framework and the Title I legal frameworks of ten states.

In general, the states selected by NIE and the Legal Standards Project included: (a) some states which have enacted state compensatory education programs; (b) approximately one state from each of the HEW regions; (c) at least one state from each of the following categories -- large urbanized, large rural, small urbanized, small rural; (d) states which had actively interpreted Title I and states that had not; (e) states that have been cited as having model Title I administrative practices, and (f) some states which have been severely criticized by OE and HEWAA.

Prior to visiting the states, the Project obtained from the SEAs written policies developed by them. These policy statements were reviewed and preliminary determinations were made concerning among other things: (a) the substance and extent of state policy making, and (b) the degree of comprehensiveness, apparent conflicts, inconsistencies, ambiguities and omission in and among state policies.

In addition to a preliminary review of the states' written legal frameworks, Project staff spent approximately one week in each state interviewing a wide range of state officials responsible for the administration of Title I, including State Title I Directors, their staffs, state auditors, and legal counsel.

The interviews conducted in the ten states were structured in accordance with an interview schedule developed by the Project and field tested in one state. In the interviews, Project staff attempted to determine: (a) the accuracy of the preliminary analysis of state materials; (b) state interpretations concerning areas which, based on a preliminary reading of the Title I statute, regulations, guidelines, and handbooks could be construed as being ambiguous; (c) perceived problems with the legal framework; and (d) areas which SEAs felt were either fundamental or important to the effectuation of the purposes of Title I.

During the study, Project staff also visited at least one LEA in each of the ten states. These LEAs were selected for their particular characteristics, e.g., rural, urban, or recently desegregated. These LEAs explained the operation of Title I in their districts. No attempt was made to analyze the veracity of their comments. NIE will be addressing questions related to LEA perceptions under a separate contract.

Following the state visits, Project staff prepared comprehensive notebooks describing each states' policies with respect to each SEA function. The notebooks included appendices containing copies of other written materials developed by the states, e.g., application forms, state handbooks, state monitoring instruments, etc.

The sections of this report describing the state legal framework are based on the analysis of written state policies made available to the Legal Standards Project and oral interpretations recorded during interviews with SEA Title I officials.

It should be noted that this paper does not identify any of the states included in the survey nor does it attribute information to specific individuals within the participating states by name. The Legal Standards Project and NIE agreed that, because of the nature of the study, it would be advisable to enter into confidentiality agreements with the various states. This confidentiality arrangement does not detract from the utility of the paper because the primary focus of the paper is on the clarity and sufficiency of the federal legal framework for state administration of Title I and on the interrelationships between and among SEA functions. The identity of specific states or particular individuals who shared SEA policies, perceptions and interpretations would not sharpen this focus.

IV. Organization of this Paper

This paper is divided into three parts. Part I is the general introduction and overview of the paper. Part II includes the Project's general findings, conclusions, and recommendations concerning the interrelationships between and among SEA functions and the clarity and sufficiency of the legal requirements for state administration of Title I. In general, the focus of Part II is on the efficacy of the existing federal legal framework. Although Part II contains illustrative examples from different functional areas, it does not focus on an in-depth analysis of any particular SEA function.

Part III of this paper includes an in-depth analysis of each of the major SEA functions. This part is divided into chapters. Each chapter describes the basic federal and state legal frameworks pertaining to the relevant SEA function(s) under discussion and then analyzes the clarity and sufficiency of the legal framework for the function and the interrelationship of that function to other functions. Each chapter includes recommendations for specific additions, deletions or modifications to the federal legal framework. These recommendations are designed to improve the federal legal framework for state administration of Title I.

V. Definitions of Major Terms

A. Introduction

Throughout the paper reference is made to terms describing the federal and state documents which present and interpret the basic requirements for SEA administration of Title I. These terms are defined below. In addition, this section also contains a general description of the basic requirements for state administration of Title I and the LEA program requirements.

B. The "Federal" or "Title I Legal Framework"

For purposes of this paper, the federal or Title I legal framework includes all documents constituting the "formal" and "informal" legal framework. These terms are defined below.

1. The Federal "Formal Legal Framework"

Whenever Congress enacts new legislation, a formal legal framework is developed containing the requirements and conditions to the receipt of benefits under the legislation. For purposes of this paper, the Title I "formal legal framework" includes the requirements appearing in the Title I legislation (Title I) and the General Education Provisions Act (GEPA), as well as the regulations officially promulgated by OE which were originally published in the Federal Register (FR) and finally codified in the Code of Federal Regulations (CFR).

The paper makes frequent reference to federal "regulations" as published in the "Federal Register" and the "Code of Federal Regulations". A federal regulation is a general rule issued by a government agency pursuant to an Act of Congress delegating such "rulemaking" to the agency. These regulations are considered to have the "full force of law":[16] This means that a requirement issued as a regulation is as legally binding as that contained in a federal statute -- so long as it is within the scope of the agency's delegated power.

In the paper there are references both to "regulations" and to "proposed regulations". The distinction can be explained by describing the process through which a regulation must pass. Under the General Education Provisions Act (GEPA), all Title I regulations must be published in the Federal Register as proposed regulations, to take effect not less than thirty days after the date of publication.[17] During the thirty-day period, the Commissioner must offer interested persons an opportunity to comment upon the proposed regulations. Following the thirty-day comment period, the Commissioner may (a) decide not to adopt the proposal as a final regulation, (b) adopt the proposed regulation in a modified form, or (c) finally adopt the regulation as originally proposed, without modification.

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[16] See Standard Oil Co. v. Johnson, 316 U.S. 481, 484(1942).

If the agency decides to adopt a regulation as final, either as originally proposed or as modified, it must republish the regulation in the Federal Register. Once each year, the regulations which have finally been adopted by OE are republished in Title 45 of the Code of Federal Regulations (cited as 45 C.F.R.).

In sum, the Federal Register is generally used by federal agencies to publish both proposed regulations and finally adopted regulations. The Code of Federal Regulations contains only the finally adopted regulations.

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[17] Section 431 of GEPA (20 U.S.C. 1232). The term "regulation" is defined in Section 431(a)(1) of GEPA to include "any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by the Commissioner." This section of GEPA also provides that the Commissioner, concurrent with the publication in the Federal Register of a regulation, must transmit to Congress a copy of the regulation which will become effective 45 days after transmission unless Congress finds the regulation to be inconsistent with the Act.

The first set of regulations implementing Title I (P.L. 89-10, the Elementary and Secondary Education Act of 1965), was published on September 15, 1965. Since then they have been amended several times to incorporate amendments to the Title I statute.[18]

The most recent amendments to the Title I regulations superseded the regulations in effect during most of the study and during our state interviews.[19] Thus, the state policies and information gathered during the study were based on the Title I regulations then in effect. Consequently, the analysis in this paper focuses on these regulations. However, this paper incorporates the new regulations in three ways in the chapters describing particular functions in Part III of this paper.[20]

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[18] They were amended (a) on February 9, 1967 to incorporate amendments in P.L. 89-313; (b) on November 28, 1968 to incorporate amendments in P.L. 89-750; (c) on October 14, 1971 to incorporate amendments in P.L. 90-247; (d) on June 28, 1973 to incorporate amendments in P.L. 91-230; and (e) on September 28, 1976 to incorporate amendments in P.L. 93-380. Proposed regulations implementing P.L. 93-380, the Education Amendments of 1974, were published in the Federal Register on March 11, 1975 (40 F.R. 11472). Final regulations were issued on September 28, 1976 (41 F.R. 42894-42923)).

[19] The Preamble to the new regulations states, in relevant part, that "all preceding rules, regulations, guidelines, and other published interpretations and orders issued in connection with or affecting Part 116 will be superseded when this regulation becomes effective." (41 F.R. 42894, September 28, 1976).

In addition to regulations, the formal legal framework includes "criteria" developed by OE which appear in program guides issued by OE (renamed Program Instructions; these instructions were made part of OE's Program Directive System). For example, the Title I legislation requires that SEAs make decisions regarding the approval of LEA applications "consistent with such basic criteria as the Commissioner may establish."[21] The program criteria are thus based on the law, and serve to clarify and elaborate on the regulations.[22]

Although these guidelines are widely disseminated, they have never been published in the Federal Register. Furthermore, according to the Preamble to the September 28, 1976 revised regulations, the "criteria" set forth in the guidelines were superseded on October 28, 1976, the date the revised

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20/ First, where the new regulations do not modify a requirement, the corresponding section of the new regulations has been included in the footnote after the citation to the regulations in effect during most of the study. Second, where the new regulations modify a requirement discussed in the text of the paper, this has been referred to in footnotes. Third, where the new regulations impact on a recommendation, this has been referred in the analysis preceding the recommendation.

21/ Section 141(a) of Title I (20 U.S.C. 241e(a)).

22/ The first set of criteria, dated April 14, 1967, was issued as Program Guide #36. It was revised and reissued within a one-year period on March 18, 1968, as Program Guide #44. Even though in need of revision to reflect amendments to Title I, this program guide is still used by SEAs and LEAs as one of the primary sources of OE policy.

regulations became effective.[23]

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[23] The legal status of these guidelines is uncertain in light of Section 503 of P.L. 92-318 and Section 431 of GEPA. Section 503 provides, among other things, that OE conduct a "study" of all published policy pronouncements, including OE "criteria" or guidelines, and then publish the results of this study in the Federal Register. This study was to be completed in 1973. Section 431 of GEPA (20 U.S.C. 1232) generally provides that (1) all "regulations" must be published in the Federal Register; (2) the public must be provided with a 30-day comment period; (3) these regulations must be republished in the Federal Register; and (4) Congress must be given a 45-day period to review them before they go into effect.

Faced with questions concerning the legality of unpublished agency circulars and pronouncements containing mandatory language, the courts have generally concluded that the requirements are binding on state and local agencies with actual notice of them, in keeping with §522(a) of the Administrative Procedure Act (5 U.S.C. §501 et. seq.) See e.g., Rodriguez v. Swank, 318 F. Supp. 289, 295 (N.D. Ill. 1970), aff'd 403 U.S. 901 (1970); Hike v. Carter, 448 F. 2d 798, 803 (8th Cir. 1971); Kessler v. F.C.C., 326 F. 2d 673, 689-90 (D.C. Cir. 1963); Section 552 provides, in relevant part, "except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter to be published in the Federal Register and not so published."

In two Supreme Court cases involving DHEW, Wheeler v. Barrera, 417 U.S. 402 (1974) and King v. Smith, 392 U.S. 309 (1968), the court has relied heavily on "requirements" contained in DHEW handbooks. In Wheeler, for example, the court authoritatively cited the handbook entitled Title I ESEA: Participation of Private School Children (DHEW Publication No. (OE) 72-62, which quotes on paraphrases Program Guide No. 24 (cancelled in 1972) in a determination concerning "comparable services" to educationally deprived children in private schools.

[footnote continues]

In sum, the Title I and GEPA statutes contain the basic requirements governing state administration of Title I. The Title I and GEPA "regulations" incorporate and explain in greater detail the essential elements of the law. The "criteria" developed by OE are based on the law and attempt to simplify and clarify the regulations. However, in no case may the regulations and OE-developed criteria contain statements which are inconsistent with the requirements contained in the legislation.

[footnote continued from previous page]

Moreover, Courts unwilling to accord guidelines unpublished in the Federal Register an equal status with officially promulgated regulations, nonetheless might find them to be binding on SEAs and LEAs through the practice and policy of judicial deference to agency administrative interpretations. Agency interpretations and guidelines are of "controlling weight" so long as they are consistent with the language of both statute and regulations. See e.g., Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); Bowles v. Seminole Rock Co., 325 U.S. 410 (1945).

With respect to those guidelines containing directory language, the suggestions are considered acceptable courses of conduct which will satisfy a legal requirement and presumably have the legal effect of protecting a recipient against audit exception if the recommended course of conduct is followed. This latter proposition assumes that the statements contained in the guidelines are not inconsistent with the statute or regulations. Courts have explained that agency interpretations may be disregarded, particularly where they are at variance with its own regulations' clear language or the clear language of the statute. See e.g., Frances v. Davidson, 340 F. Supp. 351, 365-66 (D.C., Md.), aff'd., 409 U.S. 904 (1972); Stork v. U.S., 278 F. Supp. 869, 871 (D.C. Cal. 1967), aff'd. 430 F.2d 1104 (1967).

2. The Federal "Informal Legal Framework"

An informal legal framework has developed over time supplementing the formal legal framework, i.e., statutory provisions, OE regulations, and published "criteria" set forth in program guides.

For purposes of this paper, the "informal legal framework"[24] in effect during our interviews included statements of policy issued by OE construing the statute and rules which it administers. OE interpretations concerning the informal legal framework are set forth in such documents as:

- OE handbooks,
- OE program support packages
- OE guidelines and regulations which have been cancelled or superseded,

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[24] The term "informal legal framework" is synonymous with the legal term "interpretative rules". *See* Davis, *Administrative Law Text* (West 1972) at p. 126. *In* addition to performing the rulemaking function (an analysis of which is the focus of this paper), OE is required to monitor and enforce compliance with the rules (adjudicatory function). Periodically, OE sends review teams to each state to assess their competencies with respect to performance of specified administrative functions (for example application approval, monitoring and financial management). In addition, the HEW Audit Agency periodically audits the fiscal integrity of the grant transactions and compliance with the rules. The Title I adjudicative function generally includes (a) the refusal to approve annual plans submitted by states (these plans generally assure that they will faithfully administer Title I); (b) withholding of funds, and (c) recoupment of misspent funds alleged in the audits. Policy is communicated to interested parties in various ways, including for example, OE Review Team and HEW Audit Agency reports. This paper makes references to adjudicatory documents for the limited purpose of explaining the derivation or motivation behind a particular state policy. An analysis of the policy statements made as part of the adjudicatory function appears in a separate paper prepared by NIE.

- OE program "Notices" and "Instructions" contained in the Program Directive System,
- internal OE memoranda, and correspondence between OE and particular states, construing the statute, regulations, and guidelines.

The informal legal framework also included oral statements made by OE officials at area workshops or in phone conversations (as described to the Project staff during interviews with SEA and LEA Title I personnel).

3. The Distinctions Between the Formal and Informal Legal Framework

There are two basic differences between the formal and informal legal framework. First, the statutory requirements, the officially promulgated regulations and the mandatory criteria, as set forth in certain program guides are binding on those SEAs and LEAs having actual notice.[25]

The legal status of the policy statements contained in documents constituting the informal legal framework are less clear than the legal status of the guidelines. Generally speaking, these documents contain OE interpretations concerning the meaning of the statute, regulations, and guidelines. As such, they do not have the "full force and effect of law" as regulations published in the Federal Register would enjoy. However, to the extent that these interpretations are not contrary to the clear language of the statute or regulations,[26] courts will defer to the agency's interpretations if such general principles, as described below, are followed: the agency thoroughly considered the issues; its reasoning is valid; and the interpretation is consistent with earlier and later pronouncements, and with the legislative history.[27]

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[25] As explained supra, questions may be raised concerning the enforcibility of criteria found only in program guides; however, to the extent SEAs and LEAs have actual knowledge of them, we have assumed they are binding as legal requirements or contract terms.

Unlike the regulations and guidelines, the policy pronouncements made through the informal legal framework are not always widely disseminated to all SEAs and LEAs. For example, a policy clarification made by OE in a letter to one SEA may be unknown to all the other SEAs, potentially resulting in SEAs having different levels of knowledge and understanding regarding the application of particular requirements. This is an important difference from the point of view of program administration.

OE and HEW generally do not disseminate internal OE memoranda or correspondence between an SEA and OE to other SEAs. In addition, OE Review Team Reports that monitor the administration of Title I in individual states are generally not forwarded to other states, although such reports are public information.

26/ Shea v. Vialpando, 416 U.S. 251, 94 S.Ct. 1746, 1754 n. 11 (1974)

27/ Skidmore v. Swift Co., 323 U.S. 134 (1944).

Finally, documents constituting the informal legal framework especially the handbooks and program support packages, usually use simpler language and are easier to follow than the provisions found in the statute and regulations. As will be discussed infra., simplicity does not always mean increased clarity, but it often results in wide use of these documents by SEAs and LEAs.

4. The Importance of Studying the Informal Legal Framework In Effect During the Project's Interviews

There are three basic reasons for considering the informal legal framework as part of our analysis of the legal requirements for state administration of Title I. First, since those documents which are widely disseminated, e.g. handbooks and program support packages, are phrased in non-legal, simplified language, they are often used and relied on extensively by SEA personnel to interpret legal requirements. Because of this high degree of usage, it is important to consider their consistency with the statute and regulations.

Second, it is important to analyze those documents which are not widely disseminated to determine (a) whether in the context of particular SEA functions the federal government's interpretations are consistent, well-reasoned and add clarity to the formal legal framework; and (b) whether, if widely disseminated to other SEAs, they would substantially increase

SEA understanding of the "rules of the game".

Finally, certain documents which have been presented to individual states, e.g., OE Review Team Reports, HEWAA Reports, and OE correspondence are important because in some cases they appear to have significantly influenced the policies and procedures of certain SEAs.

C. The "State Legal Framework"

1. Introduction

Under the existing federal legal framework described in this paper, the SEAs are responsible for performing certain administrative functions. The SEAs' responsibilities include, among other things, approving LEA applications and monitoring LEA Title I programs to ensure that programs meet legal requirements and are of high quality. Such responsibilities require a keen understanding of both the legal requirements for state administration and the LEA program requirements, i.e., the standards and operative definitions set forth in the statute, regulations, and guidelines. Thus, the SEA must understand the interrelationship between and among SEA functions and must be able to apply standards related to LEA program requirements to commonly occurring LEA practices. This goes beyond a merely conceptual understanding of the requirements; the level of an SEA's knowledge about standards must be such that it can advise an LEA whether a particular plan or practice is legal.[28]

Unlike the federal legal framework, many of the SEAs included in the ten-state survey have no formal state Title I "rulemaking" mechanism.[29] Therefore, distinctions between formal and informal state legal frameworks are harder to draw and not particularly useful. Thus, for purposes of this paper, no distinction has been made between the "formal" and "informal" aspects of the state legal framework.

2. The Importance of Studying the State Legal Framework

As explained *supra.*, the state rather than the federal government is responsible for the day-to-day oversight of LEA Title I programs. It is the SEA which often translates and applies the federal policies for the LEAs.

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[28] The major program requirements applicable to LEAs applying for grants under Title I (LEA program requirements) are described *infra*. at p. 41 . *See also* a separate paper prepared by the Project analyzing the major LEA program requirements entitled: *An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965*. (September 1977).

[29] We refer here to formal or conventional concepts of rule making, e.g., proposed regulations published for public comment and followed later by final regulations. SEAs have clearly developed a variety of State Title I policies and procedures, which contain the substance of rules, but which have not formally been promulgated as state Title I regulations.

Thus, it is important to consider whether SEAs have developed policies which are consistent with federal policy and, to the extent practicable, provide reasons for any inconsistencies.

Further, it is important to study the various SEA Title I policies and interpretations to determine, among other things, how the SEA interprets federal policy and conveys those interpretations to LEAs. For example, does a Title I application form developed by a SEA solicit information about each requirement that Title I requires a SEA to make a determination about when approving LEA applications? Or, does a state audit policy indicating the scope of auditing meet the requirements of the GEPA regulations, i.e., audits must include both fiscal and compliance considerations? Or, more generally, do state policies reflect ambiguities in the federal legal framework for a particular SEA function?

D. An Overview of the Federal Legal Framework For State Administration of Title I

1. Introduction

This section provides a brief overview of certain provisions in the federal legal framework as an introduction to the much more detailed description of each SEA function in Part III. For purposes of this overview, the regulations cited are those that were in effect during the state interviews. The revised regulations are referenced in the chapters describing particular functions in Part III.[30]

In general, Title I operates through a three part allocation of responsibility among OE, SEAs, and LEAs.[31] Under the Title I legal framework, the SEA must perform certain administrative functions. The most important Title I administrative functions performed by SEAs include application approval, monitoring, technical assistance, information dissemination, financial management, grant distribution, evaluation, enforcement, reporting to the federal government, and complaint resolution. In practice these functions are inter-related and some frequently overlap. Set forth below is a brief overview of the federal legal framework for state administration of Title I.

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30 / See note 20, supra.

31 / See, generally, J. Murphy, "Title I ESEA: The Politics of Implementing Federal Educational Reform" Harvard Education Review, Vol. 41, No. 1., February, 1971, p. 40.

2. Application Approval [32]

Under the federal legal framework the SEA is responsible for determining whether a project application for financial assistance under Title I submitted by an LEA complies with the program requirements under Title I as set forth in the Title I legislation, regulations, and guidelines.

Title I provides, in relevant part, that each SEA must submit an application providing satisfactory assurance that

> payments . . . under [Title I] will be used only for programs and projects which have been approved by the State educational agency pursuant to Section 141(a) and which meet the applicable requirements of that section . . . (Emphasis added.) [33]

Title I also provides, in relevant part, that an LEA may receive a grant under Title I

> only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish) (Emphasis added.) [34]

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[32] *See* chapter 1, *infra*.

[33] Sec. 142(a)(1) of Title I (20 U.S.C. 241f (a)(1))

[34] Sec. 141(a)(20 U.S.C. 241e(a))

that it has complied with the requirements of Section 141(a) and the basic criteria established by the Commissioner.

In addition to the above requirements concerning application approval, the regulations in effect during the state interviews provide, in part, that (a) the terms of each approved application must be made available for public inspection by the LEA and SEA;[35] (b) the amount of the approved application may not exceed the amount of funds made available for the LEA;[36] before an SEA may finally disapprove an LEA application, in whole or in part, it must afford the LEA reasonable notice and an opportunity for a hearing;[37] (d) the SEA may not disapprove an application, in part or for less funds than is called for, if the effect is to alter the project to such an extent that "it no longer provides reasonable promise of substantial progress toward meeting the special educational needs of educationally deprived children."[38]

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[35] 45 C.F.R. §116.34(d)(1975).

[36] 45 C.F.R. §116.34(a)(1975).

[37] 45 C.F.R. §116.34(c)(1975).

[38] 45 C.F.R. §116.34(b)(1975).

3. Rulemaking and Interpretation[39]

The regulations issued by OE recognize the rulemaking function SEAs perform under Title I.[40] The major areas in which SEAs are authorized by regulation, either expressly or by implication, to promulgate program requirements which LEAs must meet include parent involvement,[41] reporting to the SEA,[42] and program development requirements.[43]

The Title I regulations pertaining to parent participation include a provision which generally states that the SEA, at its discretion, may establish additional rules and procedures, not inconsistent with any federal rule or procedure, "as may be reasonably necessary to ensure the involvement ofparents and the proper organization and functioning of parent councils."[44]

With respect to the LEA reporting requirements, the SEA may require such reports "in such form and containing such information, as may reasonably be necessary to enable the State Educational Agency to perform its duties under Title I of the Act . . ."[45]

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[39] See Chapter 2, infra.

[40] 45 C.F.R. §116.17(o)(2)(ii)(1975) provides that members of parent advisory councils must be furnished copies of certain documents, including "State Title I regulations and guidelines."

[41] 45 C.F.R. §116.17(o)(3)(1975).

[42] Section 141(a)(7) of Title I, (20 U.S.C. 241e(a)(7)); 45 C.F.R. §116.23(1975).

[43] See generally 45 C.F.R. §116.18(b)(1975); 45 C.F.R. §116.17(c)(1975); 45 C.F.R. §116.18(a) and (e)(1975); 45 C.F.R. §116.24(1975); 45 C.F.R. §116 22(1975).

[44] 45 C.F.R. §116.17(o)(3)(1975).

In accordance with its application approval responsibility, the regulations require that the SEA determine, among other things, whether the programs described in the Title I application are developed in accordance with various LEA program requirements, e.g., a program design consistent with the objectives, sufficient concentration of funds, adequate coordination, and evaluation. In furtherance of this responsibility, SEAs have implied authority to establish general standards for Title I proposals submitted by LEAs.

With respect to interpretation, the function is not expressly set forth in either the Title I or GEPA statutes or accompanying regulations. However, it is clear that SEAs must, as part of normal program administration, interpret and clarify the meaning of Title I requirements,

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[45] 45 C.F.R. §116.23(1975).

4. Monitoring/Technical Assistance/ Information Dissemination [46]

In accordance with the general requirement that each state, through its SEA, establish proper and efficient methods of administration, each SEA must monitor Title I activities, provide technical assistance for recipients of Title I funds, and disseminate relevant information to such agencies.

With respect to the monitoring function, the legislation,[47] the regulations,[48] guidelines,[49] and OE handbook,[50] generally provide that the SEAs must monitor Title I activities to assure that adequate progress is being made toward achieving the goals of the grant.

The OE handbook entitled: *Title I ESEA: Conducting On-Site Visits*, provides that SEAs should undertake on-site visits, the purposes of which may include, among other things, a determination of (a) compliance with legal requirements; (b) fidelity of project operation to project application;

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[46] *See* Chapters 3 and 4, *infra*.

[47] *See* generally § 142 (20 U.S.C. 241f) § 143(b)(1) (20 U.S.C. 241g(b)(1)) of Title I and § 434(b)(1)(A)(I) of GEPA (20 U.S.C. 1232c(b)(1)(A)(J).

[48] 45 C.F.R. §100b. 431 (1975).

[49] *Program Guide #44*; *Program Guide #45A* (July 31, 1969).

[50] *Title I of ESEA: Conducting On-Site Visits* (Handbook for State Title I Officials).

and (c) the educational value of the activities.[51] Another OE Handbook entitled: Title I ESEA: Reviewing Project Applications suggests that the LEA Title I application can be used as a guide for on-site visits "which are necessary to assure that the projects are being operated in accordance with the approved application."[52]

With respect to the technical assistance function, the Title I legislation[53] and regulations[54] specifically provide that each SEA must provide technical assistance to the LEAs in the state with respect to the measurement of educational achievement and evaluation of programs. It is also expected that the SEA will assist LEAs in the planning and designing of Title I programs.[55]

Furthermore, it is expected that the SEA will disseminate such information to the LEAs as it deems necessary to properly and efficiently perform its administrative responsibilities. This function may include the transmitting to the LEAs in the state such written materials as: the Title I statute, OE and state regulations, guidelines, procedures, and manuals.[56]

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[51] The handbook concerning on-site visits also suggests that another purpose of the on-site visit should be to provide technical assistance to the LEAs.

[52] Title I ESEA: Reviewing Project Applications at ii.

[53] Section 143(b) of Title I (20 U.S.C. 241g(b)).

[54] 45 C.F.R. §116.33(c)(1975).
See Section 151(d) of Title I (20 U.S.C. 241o(d)).

[55] S. Rep. No. 91-634, 91st Cong 1st Sess., U.S. Code Cong. and Adm. News (1970), 2775.

[56] See generally §434(b)(1)(A)(I) of GEPA. (20 U.S.C. 1232c(b)(1)(A)(I)).

5. Grant Distribution[57]

The Title I legislation provides, in relevant part, that the Commissioner shall "pay to each State, in advance or otherwise, the amount which it and the local educational agencies of that State are eligible to receive under this title."[58] In this regard, the Commissioner is expressly responsible for determining LEA maximum grants based on the number of children from low-income families residing in each school district where sufficient data is available.[59]

The Title I statute includes the proviso "where sufficient data is available" because low-income data is available for the entire nation only at the county level. Thus, if county and LEA boundaries are coterminous, the Commissioner determines the entitlement. If they are not, the SEA is delegated the responsibility for allocating grants (sub-county allocation).[60]

Under the terms of the regulations, the SEA is responsible for sub-allocating the county aggregate maximum grant "on the basis of those available data which it deems best to reflect the current distribution in the county of [eligible children] from low-income families . . ."[61]

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[57] See Chapter 5, *infra*.

[58] *See* 45 C.F.R. §116.41(b)(1975).

[59] *See* §103(a)(2) of Title I (20 U.S.C. 241c); 45 C.F.R. §116.3(a) and (b)(1975).

[60] 45 C.F.R. §116.4(1975).

To the extent a school district is located in two or more counties, the maximum grant for such LEA is the sum of its allocations from the county aggregate maximum grants.[62] In cases in which two or more LEAs have responsibility for different groups of children in a district, or serve school districts which overlap, the SEA may allocate the amount of the maximum grants among such LEAs "in such a manner as it determines will best carry out the purposes for which the grants under Title I of the Act are respectively made available."[63]

Once the state's entitlement has been determined, it must distribute to each eligible LEA which has submitted an application "the amount for which such application has been approved except that this amount shall not exceed the amount determined for that agency pursuant to Section 103."[64]

In cases in which the SEA determines that the amount an LEA is eligible to receive (taking into consideration ratable reductions) is more than the amount it determines such LEA will use, it may reallocate the excess to other LEAs in the state which apply for additional funds and which have the "greatest need" as determined by the SEA consistent with criteria established by the Commissioner.[65]

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[61] 45 C.F.R. §116.4(b)(1975). See generally 45 C.F.R. §116.4 (1975) for additional guidelines for determining the number of eligible children to be counted in sub-allocating county aggregate maximum grants.

[62] 45 C.F.R. §116.5(1975).

[63] Id.

[64] Section 143(a)(2) of Title I, (20 U.S.C. 241g(a)(2)) 45 C.F.R. §116.43(1975). §144 of Title I, (20 U.S.C. 241h) and 45 C.F.R. §116.9(a)(1975).

The GEPA statute provides that LEAs may carry over Title I funds not obligated to the succeeding fiscal year, i.e., any funds appropriated under Title I during any fiscal year, which are not obligated and expended by an LEA prior to the beginning of the fiscal year succeeding the fiscal year for which the funds were appropriated, will remain available for obligation and expenditure during the succeeding fiscal year.[66]

6. Enforcement[67]

The Title I statute provides, in relevant part, that the state application to the Commissioner must provide satisfactory assurance that the SEA will enforce any program requirement imposed upon an LEA by the relevant sections of the Title I statute and regulations, "including the enforcement of any obligations imposed upon a local educational agency under Section 141(a)".[68]

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[65] 45 C.F.R. §116.9(b)(1975).

[66] Sec. 412(b) of GEPA (20 U.S.C. 1225(b)).

[67] *See* Chapter 6, *infra*.

[68] Sec. 142(a)(1) of Title I (20 U.S.C. 241f(a)(1)).

The regulations generally state that the SEA must provide a satisfactory assurance to the Commissioner that each LEA application approved by the SEA will comply with the program requirements contained in the Title I legislation and regulations and that the SEA will require each participating LEA to carry out all assurances given by it, and to perform all obligations imposed on it in connection with approved Title I applications.[69]

In the instances in which a particular LEA fails to comply with the comparability requirements contained in §116.26 of Title 45 of the Code of Federal Regulations, the SEA is expressly authorized to withhold the payment of Title I funds to the non-complying LEA, according to the procedures specified in that section.[70]

7. Financial Management[71]

The Title I and GEPA statutes generally provide that states which apply for participation under Title I must provide satisfactory assurance that they will establish such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of, and accounting for, Title I funds.[72]

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[69] 45 C.F.R. §116.31(c)(1975).

[70] 45 C.F.R. §116.26(k)(1975).

[71] *See* Chapter 7, *infra*.

The regulations pertaining to the fiscal management of Title I programs, which originally were contained in Part 116 of Title 45 of the Code of Federal Regulations have been incorporated and further expanded in Part 100b of Title 45 of the Code of Federal Regulations, which contain regulations issued pursuant to GEPA. The relevant sections of Part 100b require that the SEA's financial management system provide for such things as:

> (1) Audits, to determine, at a minimum, "the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance with applicable statutes, regulations, and terms and conditions of the grant or subgrant. The grantee or subgrantee will schedule such audits with reasonable frequency, usually annually, but not less frequently than once every two years, considering the nature, size, and complexity of the activity."[73]
>
> (2) A "systematic method to assure timely and appropriate resolution of audit findings and recommendations."[74]

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[72] Section 142(a)(2) of Title I (20 U.S.C. 241f.(a)(2)) provides: "Any State desiring to participate under this title shall . . . provide satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid to the State (including such funds paid by the State to LEAs) under this Title." Section 434(b)(1)(A)(II) of the General Education Provisions Act (20 U.S.C. 1232c(b)(1)(A)(II) contains similar language but is generally applicable to, among other things, all grant-in-aid programs, including Title I. See also 45 C.F.R. §116.31(d)(1975).

[73] 45 C.F.R. §100b.301(h)(1975).

[74] 45 C.F.R. §100b.301(i)(1975).

> (3) Records which identify the source and application of Title I funds, including, among other things, authorizations, obligations, unobligated balances.[75]
>
> (4) "Effective control over and accountability for all grant or subgrant funds, and real and personal property acquired with grant or subgrant funds."[76]
>
> (5) "Procedures for determining the allowability and allocability of costs . . ."[77]
>
> (6) "Accounting records which are supported by source documentation."[78]

8. Evaluation[79]

Under the terms of the Title I legislation[80] and regulations,[81] the LEA is responsible for evaluating, at least annually the effectiveness of Title I programs in meeting the special educational needs of educationally deprived children.

A similar requirement for SEAs is contained in the legislation[82] and regulations.[83] The Title I statute generally provides that the SEA will make periodic reports evaluating the effectiveness of payments under Title I and of particular programs assisted under it. Such reports must include, among other things, the "results of achievement under the programs of the several participating educational agencies with particular reference to progress made toward meeting the special educational needs of educationally deprived children."[84]

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[75] 45 C.F.R. §100b.301(b)(1975).

[76] 45 C.F.R. §100b.301(c)(1975).

[77] 45 C.F.R. §100b.301(f)(1975).

[78] 45 C.F.R. §100b.301(g)(1975).

[79] See Chapter 8, infra.

[80] Section 141(a)(6) of Title I (20 U.S.C. 241e(a)(6)).

[81] 45 C.F.R. §116.22(1975).

[82] Section 142(a)(3) of Title I (20 U.S.C. 241f(a)(3)).

[83] 45 C.F.R. §116.31 (f)(1975).

In accordance with the Education Amendments of 1974, the SEA must utilize, in carrying out its evaluation function, "uniform procedures"[85] and "objective criteria."[86]

9. Reporting to the Federal Government/Complaint Resolution [87]

Any state desiring to participate in a grant program under Title I must submit to the Commissioner, through its SEA, an application for such participation[88] and such reports as the Commissioner may reasonably require to enable him to perform his duties under Title I.[89]

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[84] *Id*.

[85] Sec. 151(d) of Title I (20 U.S.C. 241o(d)).

[86] Sec. 151(f) of Title I (20 U.S.C. 241o(f)).

[87] *See* Chapter 9, *infra*.

The SEA application must contain several assurances, the most important of which are:

(1) that the SEA will comply with the requirements imposed on it by the Title I statute and regulations;[90]

(2) that each LEA application which the SEA approves will comply with the program requirements set forth in the Title I statute and regulations, including the "enforcement of any obligations imposed upon a local educational agency under section 141(a)";[91]

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[88] Section 142(a) of Title I (20 U.S.C. 241f(a)), 45 C.F.R. §116.31(1975). See also §434 of GEPA (20 U.S.C. 1232c) which generally provides that each state applying for an applicable federal program (including Title I) must submit a general application containing, among other things, an annual program plan. 45 C.F.R. §100b.32 (1975) provides that the state's application (including its annual plan) will be considered in effect as of the date submitted to OE in "substantially approvable form", but in no event may the effective date be earlier than July 1.

[89] Section 142(a)(3) of Title I (20 U.S.C. 241f(a)(3); 45 C.F.R. §116.31(g) (1975).

[90] Section 142(a)(1) of Title I (20 U.S.C. 241f(a)(1)); 45 C.F.R. §116.31(g)(1975).

[91] Id.

(3) that the SEA will require each LEA submitting an application to carry out all assurances given by it and perform all obligations imposed on it by the Title I statute and regulations;[92]

(4) that the SEA will adopt fiscal control and fund accounting procedures to assure the proper disbursement of, and accounting for, Title I funds;[93]

(5) that the SEA will make periodic reports to the Commissioner evaluating the effectiveness of LEA projects and programs funded under Title I and "such other reports as may be reasonably necessary to enable the Commissioner to perform his duties under this title . . ."[94]

In accordance with the fifth assurance set forth above pertaining to reporting, the Commissioner has required that the SEA submit reports concerning such areas as evaluation of program effectiveness, complaint resolution, comparability, distribution of Title funds among participating agencies, a state performance report, and financial status report regarding administrative and program expenditures.

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[92] Id.

[93] Section 142(a)(2) of Title I (20 U.S.C. 241f(a)(2); 45 C.F.R. §116.31(d)(1975).

[94] Section 142(a)(3) of Title I (20 U.S.C. 241f(a)(3)); 45 C.F.R. §116.31(f) and (g)(1975).

E. Overview of the LEA Program Requirements

In addition to the legal requirements for state administration of Title I, the federal legal framework also contains requirements with which LEAs must comply when applying for a grant under Title I. These LEA program requirements, in effect, define the objectives and purpose of state administration of Title I.Set forth below is a description of them.

Title I generally provides financial assistance to LEAs to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families.

In enacting Title I, Congress made the following declaration of policy:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means which contribute particularly to meeting the special educational needs of educational deprived children. 95/

Under the Title I legislation, Commissioner of Education makes payments to SEAs for Title I grants "on the basis of

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95 / Section 101 of Title I (20 U.S.C. 241a).

entitlements created under this title." [96]

In determining the amount of the entitlement for Title I programs operated by LEAs, the Commissioner, through the National Center for Education Statistics, computes basic grants based on the number of children from low-income families residing in each county in the State. [97]

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[96] Section 102 of Title I (20 U.S.C. 241b).

[97] All states are entitled to receive funds, and state entitlements are based on the number of children from low-income families residing in the state according to the most recent census and A.F.D.C. statistics as determined by the Commissioner. The original Title I formula was 50% (the "federal percentage") of the average per pupil expenditure in the state multiplied by the number of children (aged 5 to 17) from low-income families. The 1966 Title I amendments increased payments to low expenditure states by allowing the state or *national* per pupil expenditure to be used, whichever was higher. Low-income families were defined as those families with incomes below the poverty level ($2,000 as of 1966, $3,000 as of 1968, $4,000 as of 1972), plus those families with incomes above the poverty level receiving A.F.D.C. payments. In fact, the $2,000 level has always been used because Congressional appropriatio have never been large enough to fund at a higher level. Congress mandated the use of 1970 census statistics as of July 1, 1972 (P.L. 91-230).

The 1974 Amendments (P.L. 93-380) altered the formula significantly: the state's per pupil expenditure is now multiplied by 40% and the per pupil expenditure level for any state is limited to a range of between 80% and 120% of the national average. The low-income factor is determined by the "Orshansky index" which adjusts the poverty level index according to family size and farm/non-farm location. Additionally, only two-thirds of the children from families receiving A.F.D.C. payments are now counted. The effect of these changes is to provide more aid to states with a high proportion of families below the "Orshansky Index" of poverty and to decrease payments to urban areas where A.F.D.C. payments often put families above the "Orshansky Index".

Once the SEA is notified of its total allocation for local Title I programs and the breakdown for each county within the State, it distributes the funds to eligible school districts which have submitted applications approved by the SEA.

Each application submitted by a LEA to a SEA for approval must contain a number of specific assurances that the LEA will comply with the requirements contained in the Title I legislation and the regulations and guidelines issued by OE pertaining to the design and operation of programs and projects under Title I.

These requirements are designed to make specific the general intent of Congress that Title I programs be "*designed* to meet the *special* educational needs of *educationally deprived* children in school attendance areas *having high concentrations of children from low-income families*."[98] In the above sentence, each word has a special significance which forms the basis for a requirement or series of requirements which LEAs must satisfy to receive grants under Title I.

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[98] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(1)(A)) (emphasis added).

In order to ensure that Title I programs best meet the needs of "educationally deprived children" residing in areas "having high concentrations of children from low-income families," the regulations and guidelines issued by OE contain eligibility and targeting requirements as well as requirements pertaining to private schools.

The eligibility requirements generally determine which schools and students within a district receiving Title I funds are eligible to receive funds or participate in Title I programs.

The targeting requirements generally set forth the criteria for selecting, from the list of eligible schools and children, those who will participate in Title I programs in those situations in which insufficient funds are available to design comprehensive programs for all eligible areas and for all eligible children. Since Congress has never fully funded Title I, funds have generally been insufficient to serve all eligible children since the inception of the program.

The private school participation requirements are intended to ensure that the LEA provides Title I services to meet the needs of all educationally deprived children in areas to be served by Title I programs, including those children attending private schools. [99]

In order to ensure that Title I programs are "designed" to meet the special educational needs of educationally deprived children in low-income areas, the regulations and guidelines generally require that the LEA demonstrate in its application to the SEA for Title I funds that: (a) it has undertaken a comprehensive assessment of the special needs of the eligible children (needs assessment); (b) it has described the objectives of the projects in relation to the special needs identified in the needs assessment (program objectives); (c) it has designed its program in accordance with the objectives of the project (program design); (d) it has concentrated funds on a limited number of programs and projects, thereby increasing the likelihood of success in meeting the objectives of the project (concentration);[100] (e) it will evaluate the projects to determine whether the objectives of the project have been met (evaluation); (f) it has coordinated efforts with other agencies concerned with the same target population (coordination); (g) it has involved parents in the planning, operation, and evaluation of programs (parent involvement); and (h) it has disseminated information concerning effective teaching strategies and techniques for Title I teachers (information dissemination).

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[99] The scope of this paper does not include State responsibilities with respect to participation of private schools in Title I.

Other requirements are intended to ensure that Title I programs are designed to meet the "special" educational needs of educationally deprived children, i.e., to ensure that Title I funds are not used merely to duplicate or replace services otherwise provided to children in the school district. The statute and the regulations contain (a) a restriction against using Title I funds to supplant, i.e., replace, state and local funds (supplanting restrictions); [101] (b) a requirement that services provided with State and local funds in Title I schools are comparable, i.e., approximately equal, to services provided in non-Title I schools (comparability requirement); [102] and (c) Title I funds are only used for the excess costs of programs and projects (excess costs provision). [103] In addition, the legislation contains a requirement that programs contribute particularly to meeting the special educational needs of educationally deprived children and the regulations contain a prohibition against the use of Title I funds to benefit all children in a school or school district (general aid prohibition).[104]

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[100] Concentration is closely related to the targeting requirements described above.

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[101] The "supplement, not supplant" provisions are intended to ensure that (a) school attendance areas and children participating in Title I programs are not penalized in the provisions of state and local funds because they are receiving special assistance under Title I; (b) Title I funds may only be used to pay for the excess costs of programs; and (c) in no case may Title I funds replace state and local funds that would be provided but for the existence of Title I.

[102] The comparability requirement is intended to ensure that services provided with State and local funds to educationally deprived children attending Title I schools are approximately equal to services provided to children attending non-Title I schools before the addition of Title I funds for Title I schools.

[103] The excess cost provision is simply an extension or clarification of the supplanting provision. Title I funds must be used to pay for supplemental services, i.e., Title I funds can only be used for the excess costs or supplemental aspects of a program.

Finally, the Title I legislation and the regulations issued by OE contain requirements designed to ensure that OE, the SEA, and the general public may monitor LEA compliance with the above requirements. The most important of these requirements are: (a) reporting to the SEA; (b) recordkeeping; and (c) access to information.

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[104] More specifically, the general aid prohibition is intended to ensure that Title I funds are used as categorical aid to meet the special needs of educationally deprived children, and not used for the general needs of the schools or the student body at large.

PART II

GENERAL FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONCERNING THE INTERRELATEDNESS, CLARITY, AND SUFFICIENCY OF THE LEGAL FRAMEWORK FOR STATE ADMINISTRATION OF TITLE I

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GENERAL FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONCERNING THE INTERRELATEDNESS, CLARITY, AND SUFFICIENCY OF THE LEGAL FRAMEWORK FOR STATE ADMINISTRATION OF TITLE I

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PART II

GENERAL FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS CONCERNING THE INTERRELATEDNESS, CLARITY, AND SUFFICIENCY, OF THE LEGAL FRAMEWORK FOR STATE ADMINISTRATION OF TITLE I

I. Introduction

Part II of this paper includes the Project's general findings, conclusions, and recommendations concerning the interrelatedness, clarity, and sufficiency of the legal framework for state administration of Title I. Specifically, this part will set forth our general findings and conclusions concerning the federal legal framework; our general findings concerning the state legal frameworks we reviewed; and finally our general recommendations about the federal legal framework.

Although this part contains illustrative examples[105] related to particular SEA functions, it will not analyze in detail any specific SEA function. Such an analysis appears in separate chapters for SEA functions in Part III of this paper.

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[105] It should be noted that these examples are drawn from the separate chapters on SEAs' functions. Such repetition is deliberate. Some readers may choose to review only the general findings, conclusions, and recommendations. Others may wish to consult only specific chapters on SEA functions. Thus, the use of certain examples in both Part II and a particular chapter is designed to be responsive to readers who may review the study selectively rather than comprehensively.

II. General Findings and Conclusions Concerning The Federal Legal Framework

A. Introduction

This section of the paper includes our findings and conclusions regarding the efficacy of the existing federal legal framework. First, we analyze the interrelatedness of the SEA functions set forth in the federal legal framework. Second, we analyze in general terms the clarity and sufficiency of the federal legal framework for state administration of Title I.

B. Although the Federal Legal Framework for State Administration of Title I Contains the Requirements for an Interrelated System of SEA Functions, The Interrelationships Among SEA Functions Are Not Always Fully Developed in the Federal Legal Framework

Title I is a categorical aid program. The Congressional Delcaration of Policy set forth in the Act provides in part that Title I funds must be used

> to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational program by various means which contribute particularly to meeting the special educational needs of educationally deprived children.[106]

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[106] Sec. 101 of Title I (20 U.S.C. 241a).

Congress has fixed substantial responsibility at the state level for administration of Title I by imposing certain requirements for administration of Title I upon states. We have concluded that although the federal legal framework for state administration of Title I contains the requirements for an interrelated system of SEA functions, the interrelationships among SEA functions are not always fully developed in the federal legal framework.

The interrelated nature of the SEA functions is best understood by first describing in general terms how certain functions overlap and complement each other. In addition we will discuss some examples of where the federal legal framework does not always fully develop the connections and interrelationships among SEA functions.

Application approval sets the stage. It is one of the most important SEA functions. The SEA is required to determine that a LEA application meets certain minimum quality requirements before it approves the application.[107]

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[107] In another paper prepared as part of this study, the Legal Standards Project has analyzed the extent to which the LEA program requirements about SEAs must make a determination during application approval are minimum process standards that suggest minimum levels of acceptable quality. In that paper we have recommended that the federal legal framework be amended to make explicit minimum standards for each LEA program requirement. See An Analysis of the Basis for, and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965, (September, 1977).

During application approval the SEA, in effect, places LEAs on notice as to practices which would be considered acceptable under the federal legal framework.

Application approval interrelates with several other SEA functions, e.g., monitoring, auditing, and enforcement, the SEA has an opportunity, before approving the application, to review monitoring and audit reports concerning the LEA submitting the application. If these reports indicate that the LEA has not corrected programmatic violations or has not made arrangements to reimburse Title I misexpenditures, then the SEA has an opporutnity to require that the LEA do so before the SEA approves the application.

Application approval also relates to enforcement in other ways. First, it lays the groundwork for future enforcement because the application is required to contain certain written assurances from the LEA to the SEA that it will comply with Title I requirements. Thus, the LEA grant application is a legally significant document[108] which, when approved by the SEA, constitutes an angreement between the SEA and the LEA that the LEA will use Title I funds in accordance with Title I requirements. The breach of this agreement can result in the SEA taking enforcement action against the LEA to require compliance with the terms of the agreement and with Title I requirements.

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[108] See infra, pp. 105-106 for a discussion of the legal significance of the LEA grant application.

Second, application approval also provides an opportunity for the SEA to enforce Title I requirements by requiring that a LEA application comply with these requirements before the SEA approves it. The SEA can do this by refusing to approve the application until it complies with Title I requirements or by finally disapproving it. Or the SEA could refuse to approve a pending application until past violations have been corrected.

Technical assistance is also related to application approval because the SEA has an opportunity to move beyond the minimum quality required for approval by rendering technical assistance designed to upgrade the quality of LEA applications before they are approved.

Evaluation can also be related to application approval because SEAs can determine whether the results of past LEA evaluations have been incorporated into the application review process. The extent to which this has been done can form the basis for SEA decisions concerning the unmodified continuation of projects that evaluations suggest are not meeting their objectives. 109/

109/ We do not mean to suggest that the results of past LEA evaluations should not be reflected in the program design described in future applications. Rather, the SEA should determine that this has been done.

SEA rule making can also be related to application approval because OE has indicated that SEAs can promulgate additional criteria, not inconsistent with Title I, for the approval of LEA applications. Such additional criteria can be designed to emphasize increased program quality rather than just meeting the minimum notions of quality contained in the present LEA program requirements or can emphasize independent state objectives, for example, a focus on early childhood education.

Although the federal legal framework contains the basic requirements for an interrelated system of SEA functions, we have concluded that the federal legal framework does not fully develop the connections between application approval and certain other SEA functions. For example, the federal legal framework does not indicate that SEAs must review monitoring and auditing reports concerning the LEA submitting the application and that the SEA must take the results of such reports into account in deciding whether or not to approve the application. Nor does the federal legal framework require that SEAs take evaluation results into account before deciding to approve an application.

With respect to the relationship of monitoring to other SEA functions, monitoring, both formal and informal, permits the SEA to exercise oversight authority over LEA Title I programs. It requires that SEAs determine minimum compliance with Title I requirements during the implementation stage, i.e., the operating project is consistent with the approved application and meets Title I requirements. And, since technical assistance should be rendered during monitoring of approved projects, on-site monitoring provides an opportunity for the SEA to give expert advice and assistance designed to increase program quality beyond the minimum necessary to be in compliance with Title I requirements.[110/]

In addition, monitoring is related to auditing and to enforcement. The SEA monitor can forward copies of reports to auditors for their review and information. Such reports can be helpful in identifying problem areas upon which auditors should focus attention. The SEA monitor can identify LEA practices that do not comply with Title I requirements and can require that such violations be corrected. Furthermore, the SEA monitor can initiate or recommend enforcement action or can request that an audit be conducted to determine the extent of misexpenditures or other violations.

However, we have concluded that the federal legal framework does not always adequately address interrelationshps among monitoring and certain other functions. For example, with

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[110/] Technical assistance and information dissemination need not be limited to application approval. SEAs can take a more active role, and some included in the study have done so, by developing manuals or legal program design models to assist LEAs. For example, one SEA has developed a comprehensive manual explaining parent involvement. Others have developed legal models explaining the application of supplanting concepts to in-class and pull-out programs.

respect to the relationship between monitoring and auditing or enforcement, the federal legal framework does not discuss when a SEA monitor should be required to initiate or recommend enforcement action or what enforcement action should be taken for which violations discovered during on-site monitoring visits. Interviews with SEA Title I officials suggest that some SEA monitors order prospective correction, but do not initiate or recommend enforcement action aimed at past violations.

Similarly, the federal legal framework is silent about forwarding SEA monitoring reports to auditors for their review and information. Likewise, the federal legal framework does not discuss when a SEA monitor should be required to request or order an audit. Interviews with SEA Title I officials indicated that some SEA monitors discover violations for which an audit exception might be given, but only order that the violation be corrected. The attitude, as expressed in one interview, seemed to be that maybe future audits won't uncover past violations that have been corrected by the time of the audit.

The SEA functions of auditing and enforcement are related to each other and to other SEA functions. They are also related to past and future notions of minimum quality, as are complaint resolution and reporting to the federal government. For example, the GEPA regulations require that an audit "determine at a minimum, the fiscal integrity of . . . financial transactions and compliance with applicable statutes, regulations, and terms and conditions of the grant . . ."[111] (Emphasis added.) Once a SEA audit has determined that Title I misexpenditures or violations have occurred and a decision has been made that reimbursement for misexpenditures is required, the SEA can request that the LEA make such reimbursements or correct related violations. If the LEA refuses to do so, then SEA enforcement action is required. Enforcement is designed to insure that future LEA practices will, at a minimum, meet Title I requirements.

However, we have concluded that the federal legal framework does not adequately address the interrelationship of auditing and enforcement. For example, the federal legal framework does not contain a section that specifically relates auditing to enforcement and that describes enforcement options available to SEAs to require the reimbursement of non-complying expenditures.

Thus, different SEA functions overlap and complement other SEA functions. Most are designed to emphasize minimum quality, e.g., financial management and enforcement. Some offer an opportunity for increased quality, e.g., technical assistance and information dissemination. Others include both notions, e.g., application approval and monitoring.

Not all of the above described functions are equally important. We have concluded that some SEA functions are more

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111/ 45 C.F.R. §100b.301(h)(1975).

important than others in assuring effective state administration of Title I. If, for example, application approval were deleted, the state would be unable to determine whether LEA programs and projects were being *designed* to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families. Furthermore, the LEA would not know whether its program satisfied the various program requirements. If the monitoring requirement were deleted from the federal legal framework, it would be difficult, if not impossible, to determine if the program were being *implemented* pursuant to the LEA program requirements and to the design in the LEA application. Or, if technical assistance were deleted, the opportunities to maximize program quality would be reduced. We have concluded that the present SEA functions contained in the federal legal framework would be retained.

We also found that there is some tension inherent in the interrelated SEA functions. For example, the scope of SEA monitoring includes both rendering technical assistance and requiring compliance with Title I requirements. Some SEAs indicated that there is some tension between assisting and enforcing during the same on-site visit. However, the SEAs explained that these tensions do not appear to be sufficiently severe to warrant deleting either technical assistance or enforcement from the federal legal framework.

In sum, although some functions, like application approval, monitoring and technical assistance are more important than others, all have a role in the legal framework for state administration of Title I. And, some functions overlap and complement each other, but the federal legal framework does not always address these interrelationships.

C. Certain Aspects of the Formal Legal Framework When Supplemented by the Informal Legal Framework, Are Sufficiently Clear. However Other Aspects Are Not Set Forth With Adequate Clarity and Sufficiency to Prevent Widely Varying State Interpretations of the Same Aspect of a SEA Function

1. Introduction

The purpose of this section is to summarize the major conclusions of the Legal Standards Project with respect to the clarity and sufficiency of the formal legal framework, supplemented by the informal legal framework, for state administration of Title I. These conclusions involve findings about (a) clarity, e.g., do SEA Title I personnel know what they must do and what they cannot do under Title I; and (b) sufficiency, e.g., is the basic requirement clear, but some important aspect of it is not addressed by the legal framework?

With respect to the clarity and sufficiency of the federal legal framework for state administration of Title I, the Legal Standards Project has concluded that certain asepcts of the formal legal framework, when supplemented by the informal legal framework, are sufficiently clear. However, other asepcts are not set forth with adequate clarity or sufficiency to prevent widely varying state interpretations of the same aspect of a SEA function.

Although neat categorization is elusive because the problems of clarity and sufficiency sometimes overlap aspects of a particular function, set forth below are illustrative findings and conclusions related to the above general conclusion. For purposes of this discussion, they are presented in three categories: (1) implied SEA authority in the federal legal framework has produced widely varying SEA policies; (2) the federal legal framework does not always adequately clarify the scope of some SEA functions; and (3) the federal legal framework does not always set forth sufficient standards for certain aspects of some SEA functions.

However, before we can address these conclusions directly, it is important to consider generally the extent to which the informal legal framework has clarified the formal legal framework. The documents within the informal legal framework are of two types: those that are widely disseminated and those that are not.

a. The Documents Which are Widely Disseminated[112] -- In the past eleven years, OE has published a number of handbooks and program support packages which are intended to clarify SEA functions and the LEA program requirements set forth in the statute, and regulations and "criteria" set forth in program guides.[113] The topical areas explained in these handbooks include both the SEA's functions, in general, and, in particular, two important SEA functions: reviewing project applications and conducting on-site visits to monitor LEA Title I programs and projects.[114] Program support packages have been written explaining virtually every SEA administrative function and LEA program requirement.

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[112] Detailed analyses of specific points in the documents which are widely disseminated are included in the chapters describing and analyzing particular SEA functions in Part III of this paper.

[113] In addition to the dissemination of handbooks explaining some SEA functions and the various Title I requirements, OE has disseminated "model" Title I program designs. It appears that many of these "models" are described without regard to the basic requirements and therefore may be construed as constituting illegal practices. Several SEAs interviewed felt strongly about OE's failure to properly edit these "models".

[114] Title I ESEA: Reviewing Project Applications and Title I ESEA: Conducting On-Site Visits.

With respect to these widely disseminated documents, we have generally concluded, based on our interviews in ten states, that these documents are helpful primarily because of the simplicity of the language employed, but limited in usefulness because they rarely address difficult areas requiring interpretation. Secondly, we have concluded that the policies set forth in these documents are generally consistent with the statute, regulations, and guidelines which they are supposed to clarify. Finally, we found that in some cases, these documents include substantive rules or suggestions for appropriate courses of conduct not otherwise appearing in the statute, regulations, or guidelines.

In addition to the above conclusions, we also have concluded that these widely disseminated documents are (a) not always precisely phrased, (b) not always consistent, (c) outdated and (d) not always complete in describing requirements. Set forth below is a brief discussion expanding upon these conclusions by way of illustration.

The handbook Title I ESEA: How It Works - A Guide for Parents and Parent Advisory Councils [115] was generally well received in the states. In fact one state Title I Director explained that he uses this handbook as a manual for training his staff and local Title I coordinators, as well as parents. The manual generally describes in clear and simple language the basic requirements with which the LEA must comply in order to receive Title I funds, the functions which the SEAs and the U.S. Commissioner of Education must perform, as well as the duties and responsibilities of the parent councils.[116]

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[115] DHEW Publication No. (OE 73-07104) (1973).

With respect to the finding that certain aspects of the informal legal framework are not always complete in describing requirements, we found that this handbook contains a section entitled "What are the State's Responsibilities Under Title I ESEA?"[117] The section purports to list "the specific duties of the State Education Agency according to Title I law and regulations."[118] The list contains several requirements imposed on SEAs by Title I, but contains no mention of such basic requirements as SEA auditing or audit resolution. The only mention of auditing in the section is set in the context of monitoring and technical assistance. The handbook indicates that if a monitoring team found,

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[116] The intended purpose of this handbook was to describe the basic Title I legal framework in general terms; it was not intended to be exhaustive in its description. Therefore, the use of this handbook in lieu of the Title I statute or regulations would not be appropriate.

[117] Reviewing Project Applications, at 41.

[118] Id.

> many problems in the local Title I program, it can suggest, as part of its final report, that various specialists on the state staff visit the school district to help solve the problems. For instance, a state auditor might be able to help local staff members set up an accounting system to keep better track of Title I funds."[119]

There is no suggestion that "many problems in the local Title I program" and keeping "better track of Title I funds" indicate situations where a SEA audit or SEA enforcement action may be necessary. In fact, although rejecting applications and the compliance aspect of monitoring are referred to, the word "enforcement" does not appear anywhere in the section on the state's responsibilities under Title I.

As for the finding that certain aspects of the informal legal framework suggest an appropriate course of action not found in the statute, regulations, or guidelines, we note that the Title I statute and regulations give no guidance as to the extent of technical assistance which SEAs must render to LEAs beyond the general mandate that SEAs provide "technical assistance for the measurements and evaluations" of Title I programs.[120] The same handbook states that "states, with their larger staffs, must provide as much technical assistance as possible to local school districts . . . ."[121] Similarly, with respect to SEA rule making, the Title I regulations, with the exception of express authority for SEAs to promulgate regulations governing parent advisory councils, do not contain clear and explicit authority for SEAs to promulgate state Title I rules. The handbook states that "states may also issue rules and procedures for Title I, as long as they do not conflict with federal regulations and law."[122/]

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[119] Id. at 43.

[120] Section 143(b) of Title I (20 U.S.C. 241g(b)).

[121] Reviewing Project Applications, at 43.

With respect to the finding that certain aspects of the informal legal framework are outdated, we note that a second handbook, Title I, ESEA, Reviewing Project Applications, was designed to assist SEAs in reviewing LEA applications.[123/] Although the intent of the handbook was to provide guidance to SEAs, we wonder, in view of the changes that occur between proposed and final regulations, how SEAs reacted to a statement that the handbook included requirements based on proposed regulations.

> The regulations cited in the handbook represent the most current draft. Although a few have not received final approval, the assumption is that they will be approved. If they are not, the requirements will, of course, be changed.[124/]

[122/] Id. at 66.

[123/] There is no publication date on the copy of the handbook made available to the Legal Standards Project. However, since the Handbook indicates that at the time of publication, Eliot Richardson was Secretary of HEW and Sidney Marland was Commissioner of Education, we infer that the handbook was published some time between December 1970 and November 1972. (Richardson's tenure ran from June 1970 - January 1973 and Marland's from December 1970 to November 1972).

[124/] Reviewing Project Applications at 1.

To the best of our knowledge, this handbook has never been revised to include amendments to the Title I statute or regulations since its publication.[125] At least one state included in the study indicated that they still used this handbook with state notations to reflect changes since its publication.[126]

b. The Documents Which Are Not Widely Disseminated -- Although the widely disseminated documents explaining SEA functions and LEA program requirements have been helpful, these documents generally do not address difficult areas requiring OE interpretation. However, on numerous occasions OE has dealt with these difficult questions in correspondence to individual states.

In the past fourteen months we have analyzed numerous letters between OE and various states. Based on this analysis, we have concluded that OE has already interpreted in writing many of the more difficult and controversial issues, and that these interpretations are generally clear, consistent and reasonable when viewed as a whole.

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[125] e.g., the Education Amendments of 1974, among others.

[126] It does not appear that OE still considers this handbook to be in effect. There is no reference to it in the Title I Directive containing the list of active program information notices or program guides which were converted to the Title I directive system. ESEA Title I Program Directive Notice A102 (September 26, 1972).

The qualification "when viewed as a whole" must be added because it was often difficult to understand a specific letter, when read in isolation. When that letter was read in conjunction with other OE letters explaining related points, an underlying policy emerged which appeared clear, consistent, and reasonable.

In short, we conclude that there exists at this time a body of OE interpretations which, if assembled, summarized, interrelated and disseminated would resolve the overwhelming majority of questions raised by SEAs and LEAs. For example, with respect to the SEAs authority to develop and apply additional state Title I criteria for the approval of applications, OE letters express approval of this practice. On another issue, the applicability of the statute of limitations provision[127] to SEA audits, OE has indicated in correspondence that "it would be reasonable to conclude that this statutory provision would be applicable" to an SEA audit.

Thus, the contention that OE does not have the capacity to interpret the law in a consistent, clear, unambiguous manner is, in our opinion, unfounded.

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[127] Sec. 804 of ESEA (20 U.S.C. 884).

OE can, however, be faulted for not widely disseminating these interpretations. Too often OE has not shared its well thought out answers to difficult issues facing one SEA with other SEAs.[128]

2. Implied Authority in the Federal Legal Framework has Produced Widely Varying State Policies

The federal legal framework often directly and expressly states that SEAs have authority to take a particular action, e.g., to approve applications. However, there are situations where the statute or regulations do not clearly and explicitly authorize a SEA to do something, but either suggest indirectly that the SEA has authority or otherwise imply that the SEA has authority in a given area. The Legal Standards Project has concluded that where such implied authority exists in the federal legal framework, widely varying state policies have resulted.

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[128] It should be noted that we are only commenting on OE's correspondence to agencies containing interpretations of policy. We are not here commenting on other aspects of OE administration, such as its ability or willingness to enforce the law and the regulations consistent with these written correspondence. Whether OE holds SEAs and LEAs accountable for operating consistent with these interpretations is beyond the scope of the Project and, therefore, this paper.

Several SEAs indicated that if OE wanted them to perform a particular function, then the regulations should clearly and expressly reflect the requirement. One state Title I director stated that

> It is difficult to administer any federal program, especially Title I. LEAs are constantly saying to us, "Whose side are you on?" When there is an express statement of a requirement in the regulations, we can point to it and say that we are only complying with federal laws. However, where our authority is not clear, we are often unable to do anything even though we think Title I requires it. If OE wants us to do something they should come right out and say so clearly in the regulations.

Some examples wherein implied authority has created widely varying state policies include implied authority for SEA rule making and SEA withholding or suspension of funds. With respect to implied authority for SEA rule making, the regulations do not directly and expressly authorize SEAs to promulgate rules other than those governing parent involvement. [129] Yet the regulations also require that LEAs must furnish members of parent advisory councils with copies of certain documents, including "State Title I regulations and guidelines."[130] The provision is not limited to state Title I regulations and guidelines governing parent involvement and it implies that SEAs may issue state Title I regulations and guidelines.

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[129] 45 C.F.R. §116.17(o)(3)(1975).

Former OE Program Guides #24 and #36 have implied that SEAs could develop and apply additional criteria for approval of applications.[131] OE correspondence to some SEAs in the study have indicated approval of this. Title I ESEA: How It Works indicated that states could establish additional rules and procedures not inconsistent with the federal law and regulations.[132]

Taking these various approving references into account, it is reasonable to conclude that OE permits SEAs to promulgate state Title I rules, guidelines or criteria not inconsistent with Title I and that SEAs have implied Title I rule making authority in areas other than parental involvement.

However, SEA perceptions of SEA rule making authority vary from state to state. All SEAs have issued some general policies and procedures for Title I. Some SEAs make use of SEA rule making to attempt to improve program quality or to restrict LEAs' program design on the basis of educational policy. Other SEAs do not do so because they indicate they lack express authority to promulgate additional criteria or to impose restrictions on LEAs for reasons of educational policy, e.g., to focus Title I funds on a particular grade span. One SEA indicated that the SEA relationship with LEAs was such that it needed to be able to point to a specific provision in the federal regulations authorizing the SEA to promulgate SEA criteria designed to do more than meet the minimum criteria established by the Commissioner.

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[130] 45 C.F.R. §116.17(o)(2)(ii)(1975).

[131] ESEA Title I Program Guide #24, 8.1 (cancelled September 26, 1972) referred to the SEA being able to "establish criteria." ESEA Title I Program Guide #36 (April 14, 1967) (superseded by Program Guide #44, March 18, 1968) referred to "other such criteria as the [SEA] may apply."

[132] Title I ESEA: How It Works DHEW Publication No. (OE-73-07104)(1973) at 66.

With respect to implied authority for SEA enforcement, Title I requires the SEA to enforce Title I requirements, but the federal legal framework contains some enforcement related provisions that are express, e.g., authority to disapprove applications that do not conform to Title I [133] and some that imply enforcement authority, e.g., SEA withholding or suspension of funds.

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[133] 45 C.F.R. §116.34(a)(1975). See §141(a) of Title I (20 U.S.C. 241e(a)) and §142(a)(1) of Title I (20 U.S.C. 241f(a)(1)).

As for implied authority for SEA withholding or suspension, a provision in the GEPA statute indicates that SEA failure to provide funds in amounts in accord with the requirements of laws and regulations and termination of further assistance for an approved program are reasons why a recipient of funds aggrieved by a final decision of a SEA and alleging a violation of federal law, regulations, or guidelines may request a hearing at the SEA.[134] The implication is that the SEA has implied authority to withhold or suspend funding to a LEA. Yet the federal legal framework does not directly and expressly authorize SEAs to withhold funds except for a comparability violation.[135]

Some SEAs have indicated that they have authority to withhold or suspend Title I funds for any violation. A few SEAs have indicated that they have authority to withhold funds for certain violations enumerated in state policies. Other SEAs believe they have authority to withhold, but not to suspend funds with a loss of funds during the interim. Some SEAs

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134/ Sec. 425(a) of GEPA (20 U.S.C. 1231 b-2).

135/ 45 C.F.R. §116.26(k)(1975).

indicate they have authority to suspend funds with loss of funds during the interim. One state Title I director does not feel he has authority to withhold funds for any violation except comparability. He stated that, "I don't know what we would do" if a violation other than comparability were discovered after application approval and the LEA refused to correct it voluntarily.

We have concluded that SEAs are required to enforce Title I, but that implied authority in the federal legal framework has produced widely varying state policies with respect to a SEA's enforcement authority, especially in the area of withholding or suspension of funds.[136]

In sum, we have concluded that, to the extent OE expects a SEA to perform a particular function, it must clearly and expressly explain the extent of SEA authority in the federal regulations.

136/ A question related to SEA enforcement authority is whether the federal legal framework is organized to facilitate SEA enforcement. Enforcement related provisions are scattered throughout the federal legal framework and there is no separate section in the Title I regulations that contains a list of SEA enforcement options and sanctions and the authority to impose them. In fact, there is no separate section for SEA "enforcement." The regulations refer only to the obligation to enforce.

3. The Federal Legal Framework Does Not Always Adequately Clarify the Scope of Some SEA Functions

The Legal Standards Project has concluded that the federal legal framework does not always adequately clarify the scope of some SEA functions. For example, in the area of SEA rule making, we found that despite the lack of express authority for SEA rule making, some SEAs have developed state policies that restrict a LEA's program design options. However, the extent to which they may do so is not made clear in the federal legal framework for state administration of Title I. 137 /

We found that some states have developed policies which narrow local discretion in certain areas. During the course of our study, we concluded that there are three distinct categories of SEA policies restricting program design options. These policies are directed toward (a) objectively defining federal requirements; (b) guarding against audit exceptions; and (c) promoting the educational philosophy of the SEA.

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137 / We have also concluded in another paper prepared as part of this study that the language of the federal legal framework for LEA program requirements is generally not restrictive with respect to limiting the design and effective delivery of educational services to educationally deprived children residing in low-income areas. See An Analysis of the Basis for, and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965, (September, 1977)

The first category includes state policies which objectively define certain federal requirements, which OE intentionally left somewhat open so as not to interfere with the states' discretionary authority to approve LEA applications. The primary example is the concentration requirement which mandates that programs must be of "sufficient size, scope, and quality" to assure reasonable promise of success. One SEA has set a minimum figure of $234 per child. A second state has set a range between $350 and $550.

The second category includes policies which are intended to guard against possible audit exceptions. These policies are pursued _either_ by choice or because of insufficient understanding of the meaning and scope of the requirements.

For example, one SEA will only approve pull-out type programs under Title I. Another state prohibits program design components which, based on past experience, have been prone to abuse. This SEA flatly prohibits the use of Title I funds to pay for all services which an earlier HEW audit challenged as general aid violations. These included art, music, gym, home economics, band programs which serviced an entire school population (not only educationally deprived children) and support services, e.g., guidance counselors and nurses, which were being supplied to all children. However, while the SEA prohibits Title I from paying for such services even for Title I children, the auditors objected only to non-Title I children being served with Title I funds and not to the provision of such services if required to meet the needs of Title I children. It is our conclusion that this state policy was pursued because of a lack of understanding as to the meaning of the audit finding, and a fear of being "burned" again in the future.

The third category of restrictive state policies directly concerns the educational philosophy of the SEAs rather than a fear of audit exception. Some states use the Title I requirements as a means of furthering a state goal. Examples of such state requirements supplementing the federal requirements include: requirements that Title I funds be focused on a particular grade span (e.g., K-6, 7-9, 10-12), mandating individualized instruction and requiring minimum qualifications for all Title I paid staff, including teacher aides.

In contrast to these examples, we also found some states where, because of a lack of clarity about authority for SEA rule making and the scope of that implied authority, SEAs felt they lacked authority to impose additional criteria, designed to enhance program quality, for the approval of LEA applications.

It is our conclusion that maximum discretion should be allowed for SEAs to develop policies which objectively define federal requirements and which further state policy, within the Title I legal framework.

However, we believe that OE should clarify all of the various LEA program design options available and the circumstances under which specific components may be included so that SEAs do not unduly restrict LEA program design options on the basis of generalized fear of audit exceptions.

With respect to the scope of auditing, it is clear that audits must "determine, at a minimum, the fiscal integrity of . . . financial transactions and reports and the compliance with applicable statutes, regulations and terms and conditions of the grant."[138] Thus, each Title I audit must address both fiscal and compliance considerations. What is not clear is the scope of the compliance determination. For example, does "compliance" mean that a SEA audit must determine whether LEA Title I projects comply with each and every requirement imposed on LEAs by §141(a) of Title I? Does it mean that an auditor has unfettered discretion to determine which of the applicable requirements will be reviewed for compliance? Does it mean, in a practical sense, that an auditor should concentrate on the major program requirements? If so, which ones?

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[138] 45 C.F.R. §100b.301(h)(1975).

We found that the great majority of SEAs included in our study did not appear to conduct audits that included both the fiscal and compliance considerations required by the regulations. However, we have concluded that the lack of clarity in the scope of the compliance determination that must be a part of every audit does not explain the apparently widespread lack of compliance with the requirement that audits include both fiscal and compliance considerations. The basic requirement is clear.

4. The Federal Legal Framework Does Not Always Set Forth Sufficient Standards for Certain Aspects of Some SEA Functions

The Legal Standards Project has concluded that the federal legal framework does not always set forth sufficient standards for certain aspects of some SEA functions. For example, the GEPA regulations require that SEAs have a "systematic method to assure timely and appropriate resolution of audit findings and recommendations."[139]

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[139] 45 C.F.R. §100b.301(i)(1975).

It is not clear what constitutes such a "systematic method." What standards should OE program reviews or HEW auditors apply to determine whether a SEA's audit resolution procedures constitute a "systematic method." Is a SEA expected to have written audit resolution procedures? What does "timely and appropriate resolution" mean? Does it mean that audit findings should be resolved within 90 days, six months, a year, two years? Are SEAs expected to establish their own deadlines for audit resolution? Is the state Title I office expected to notify auditors when audits have been settled?

We found that over half the states included in the study either did not have written audit resolution procedures or did not make them available to the Legal Standards Project. Several SEAs indicated that informal procedures exist for resolving audit findings. In those few SEAs that had written audit resolution procedures, only one had established any written deadline for completing audit resolutions.

We have concluded that the absence of minimum standards for what constitutes a "systematic method" of audit resolution has produced a variety of informal systems for resolving audit findings and that such informal methods make it difficult to determine if a SEA has a "systematic method to assure timely and appropriate" audit resolution.

With respect to audit standards, we found that neither the Title I nor the GEPA regulations contain minimum audit standards. We note that early Title I Guidelines[140] established some audit standards for Title I audits, but that these were not carried over in any form to the current federal regulations. In addition, we note that the Comptroller General's GAO audit standards establish standards that are intended for application "to audits of all government organizations, programs, activities, and functions -- whether they are employed by Federal, State, or local governments . . ."[141] However, there is no reference to such standards in either the Title I or GEPA regulations.

In general, we have concluded that the federal legal framework does not always set forth sufficient standards for certain aspects of some SEA functions. We have also concluded that the presence of such minimum standards would provide useful guidance to SEAs and would give OE or the HEW Audit Agency standards that would help them determine whether a SEA was performing certain aspects of some functions in a manner calculated to promote effective state administration of Title I.

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140 / Guidelines: Special Programs for Educationally Deprived Children /Elementary and Secondary Education Act of 1965/ Title I, OE-35-79(1966). The Guidelines were in effect until February, 1972.

141 / Standards for Audit of Governmental Organizations, Programs, Activities, and Functions, by the Comptroller General of the United States, General Accounting Office (1974 reprint), at 1.

III. General Findings and Conclusions Concerning the State Legal Frameworks

A. Introduction

Historically, many SEAs did not take their oversight responsibilities under Title I seriously. They were not willing to interfere with LEA practices; LEA applications were given only cursory review, and little if any on-site monitoring took place.[142] This attitude was reinforced by the SEAs' perceptions that OE was not willing to exercise active oversight over SEA administration of Title I. Although the HEW Audit Agency was reporting widespread misexpenditures of Title I funds, OE was viewed as being unwilling to act upon these alleged misexpenditures.___/ In this environment, the questions of whether the legal framework for state administration was interrelated, clear and sufficient and whether the LEA program requirements were clear and flexible were not of central importance because of a belief that it did not make any appreciable difference how SEA functions or LEA program requirements were interpreted.

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[142] See, e.g., Washington Research Project and NAACP Legal Defense and Educational Fund, Title I of ESEA: Is It Helping Poor Children? Washington, D.C.: Washington Research Report of the Southern Center for Studies in Public Policy and the NAACP Legal Defense and Education Fund, 1969 and An Even Chance: A Report on Federal Funds for Indian Children in Public School Districts. Washington, D.C.: NAACP Legal Defense and Educational Fund, 1971. See also, M. Wargo et al, ESEA Title I: A Reanalysis and Synthesis of Evaluation Data from Fiscal Year 1965 through 1970, American Institutes for Research in the Behavioral Sciences, (March 1972) at 5: "HEW audits of 40 states conducted between FY 66 and FY 69, for example, indicated that states have failed to adequately review LEA project applications, monitor and audit LEA activities, and insure proper financial control of Title I expenditures. More specifically, state audits of LEAs were of limited scope in 24 states and too infrequent in 11. Nine states failed to require adequate project justification from their LEAs and 32 used, or allowed their LEAs to use, improper accounting procedures and internal fiscal controls. Further, LEAs were permitted to use Title I funds as general school aid in 7 states; to supplant (replace) other federal, state, and local funds in 14 states; and to divert funds for purposes unrelated to Title I in 18 states. Twenty-one states failed to ensure that their LEAs concentrated their resources on the most academically needy children. Poor equipment management was also observed as a failure to obtain community and parent involvement in the planning, implementation and evaluation of projects."

Today, and possibly for the last few years, it appears that the attitudes of many of the SEAs included in our survey concerning their administrative responsibilities and their perception of OE's oversight role have changed.

The review of the state written materials and the SEA comments made during our interviews indicate that a number of SEAs are taking their administrative duties under Title I seriously today and, as a consequence, are anxious for OE to clarify both certain aspects of SEA functions and the LEA program requirements which they must administer. Some of these

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143/ *Id*.

changes are described below.

First, an increased willingness to regulate LEA/Title I practices and program designs is evidenced by the amount and comprehensiveness of the state materials. For example, many application forms now require comprehensive narratives describing the Title I programs and projects. In the area of LEA program requirements, several states developed legal non-supplantive models during the 1975-1976 school year. A comprehensive manual for parents was developed by one SEA in 1975.

Second, SEAs are implementing OE Review Team and HEWAA Report suggestions and, over time, the Review Team Reports seem to be improving. For example, a review team told one state its Title I application did not obtain sufficient information respecting compliance with the school attendance area eligibility requirements. In the next year's application form, the OE recommendations were evident. The same state was told in a recent audit that the "SEA approved project proposals, contrary to established project approval criteria,that did not clearly state education objectives or the type and extent of change expected." In the next year this SEA established procedures to ensure, "that all projects will be stated in performance terms with an appropriate evaluation scheme." In a second state the 1968-1971 OE Review Team Reports found a substantial number of problems. By 1975, the Review Team Report was highly complimentary. There is still room for improvement: one state included in our survey is still the subject of highly critical OE reviews.

Third, SEAs are questioning the quality and even the legality of some of the documents disseminated by OE. One SEA Title I Director explained to us that one of his biggest administrative problems involves censoring OE disseminated materials prepared before 1972 which describe exemplary programs involving clearly illegal practices under present interpretations. He was concerned that these materials would confuse the LEAs and make his job that much more difficult.

Finally, one SEA Title I Director described an incident which occurred at a regional meeting called by OE following the promulgation of proposed regulations in March of 1975. During this meeting an SEA Title I Director asked the OE representative to clarify a particular phrase in the regulations. The OE representative winked and said we intentionally left that standard vague so that you would have maximum flexibility. At that point, almost the entire audience expressed dissent and demanded more clarity. We were told that they wanted to know what was expected of LEAs so that they could ensure that it happens. The SEA representatives demanded clarity, not obfuscation.

Although we did not undertake an exhaustive study of the reasons for this change in attitude, the following possible explanations are included.

First, many of the SEAs and LEAs interviewed now perceive OE's position regarding enforcement as changing. They now fear that OE will in fact attempt to recover misspent Title I monies. One possible reason is the existence and functioning of the Title I Audit Hearing Board.

Second, many SEAs believe that after 11 years, Title I is here to stay and that a shift to federal aid with "no strings" attached is probably not in the offing for the immediate future. Consequently, SEAs have a heightened interest in influencing policy under the present legal framework.

"Watergate" also appears to have had an effect. One SEA explained its recent change in policy from a laissez-faire approach to meaningful oversight in terms of a heightened awareness in state agencies of responsibility to act in accordance with the law. Thus, SEAs appear to be treating legal requirements more seriously.

In sum, based on a review of written policies and procedures, it appears that many SEAs included in our survey (a) are increasingly willing to perform their administrative functions; and (b) believe that OE will seek repayment when the HEW Audit Agency finds that Title I funds have been misspent.

When viewed from this perspective, the ability of the SEA to interpret the legal requirements for state administration and to comprehend the meaning of the standards and operative definitions set forth in the formal legal framework, supplemented by the informal legal framework, takes on added significance.

Set forth below are our general conclusions concerning the state legal framework for Title I. For purposes of this discussion, we have included three major categories of findings and conclusions: (1) the state legal framework for state administration of Title I must be viewed in the context of intergovernmental relationships between SEAs/HEW/OE, and between SEAs and LEAs; (2) the state legal framework for different SEA functions varies widely in quality and comprehensiveness; and (3) the review and analysis of the state legal framework for state administration of Title I suggests that some SEAs may not be in full compliance with all the legal requirements for state administration of Title I.

B. The State Legal Framework for State Administration of Title I Must Be Viewed in the Context of Intergovernmental Relationships Between SEAs and HEW/OE and Between SEAs and LEAs

The Legal Standards Project has concluded that the state legal framework for state administration of Title I must be viewed in the context of intergovernmental relationships between SEAs and HEW/OE and between SEAs and LEAs. Two general findings led to this conclusion. First, the content of the state legal framework in several SEAs included in the study appears to have been influenced by OE Review Team reports and HEW Audit Agency reports. Second, the content of the state legal framework in several SEAs included in the study appears to have been influenced by a tradition of LEA autonomy and local control of education. Set forth below are some representative examples of these general findings.

With respect to the influence of OE Program Review reports and HEW Audit Agency reports, we found that they have influenced some aspects of some state legal frameworks for state administration of Title I. For example, in the area of application approval, in one SEA, it was evident from reading the program reviews of 1973 and 1974, and comparing those recommendations to the existing application approval procedures in the SEA, that the review teams have had a substantial impact on the SEA's performance of its application approval function. The following is a list of changes that have taken place in the past couple of years:

(a) development of an application checklist; (b) deadlines for submission (OE recommended that the deadline be changed from September to May); (c) approval date -- the OE review team recommended that approval deadline August 1; the actual SEA approval date is now August 30; (d) types of approval -- the OE team recommended that the SEA tighten up its control over review of applications "so as to secure all necessary changes before projects are scheduled to begin." It also recommended that the SEA "drop tentative approval except in rare emergency situations; inform LEAs that Title I funds may not be used to reimburse expenditures for personnel services rendered prior to date of official, written notification that the state has approved the application or found it to be in substantially approvable form. The FY 1977 application form reflects this policy. The SEA Title I director generally indicated that OE review team comments concerning application approval were a definite factor in the state's decision to change the application form and checklist.

In the area of SEA enforcement, one State Title I Director mentioned that the SEA had attempted to enforce certain comparability provisions and that OE had not supported the SEAs position to the SEAs satisfaction. Consequently, the State Title I Director felt that his job of enforcing Title I requirements was made much more difficult because of lack of OE support for SEA enforcement. Another State Title I Director gave the following response to a question about OE technical assistance in the area of enforcement: "OE has not been responsive to our request for written policy clarifications. Nobody in OE wants to make a decision."

The effect of one HEW/AA audit on an SEA has been dramatic. The auditors claimed that a significant percentage of violations could have been prevented if the SEA had properly reviewed the LEA's applications. The SEA, with the support of a newly elected state superintendent, recognized its responsibilities and developed policies and procedures to correct shortcomings highlighted by the audit. Another SEA indicated that it had made revisions in its application approval process following an HEW/AA audit. Two examples of the audit findings and SEA responses contained in an SEA letter to OE follow.

> Statement (HEW/AA): "The SEA approved activities or provided services which were not identified with the special needs of educationally deprived children."
>
> Response (SEA): "The application format now requires all districts to provide specific needs assessment information as a basis for any services required under Title I. See Position Paper on Needs Assessment for ESEA Title I Application (Pages 11-14), both of which are enclosed."
>
> Statement (HEW/AA): "The SEA's analysis of information within LEA project applications was inadequate because non-target schools were served. The need for tighter control over LEA operations is indicated."
>
> Response (SEA): "The review process now includes specific checking of all calculations establishing eligible buildings. See attached [Administrative Review Checklist] and the instructions to districts contained in the attached SEA Guidelines and Instructions, Pages 7 and 8 and Appendix B."

However, not all OE Review Team reports or HEW Audit Agency reports have had an immediate effect on all SEA legal frameworks. In one state OE repeatedly criticized the SEA's application approval process in several OE Review Team reports and in one such report stated that the SEA had rejected earlier recommendations and this had led to "further deterioration in quality and compliance." However, as a result of extensive negotiations with OE, this SEA has revised part of its application approval policy.

With respect to the influence of the SEA relationship to its LEAs, we found that in some states historical attitudes toward SEA control appear to have influenced the manner in which the SEA administers Title I. In these states the traditional autonomy of LEAs and the history of local control over public education appear to have an inhibiting effect on some aspects of SEA administration of Title I. For example, in one state with a tradition of strong local control of education, the state has established a decentralized public education system involving intermediate school districts. The state sets a limit on the number of people that may be employed at the SEA and federal programs receive a low priority in the assignment of staff. As a recent compromise, the state began relying on outside consultants and consultants working out of the intermediate school districts. LEAs have resisted strong direction from either the SEA or the intermediate level. Some LEAs, particularly certain urban ones, prefer to deal directly with OE. This appears to undermine the SEA's enforcement capability.

In another state, the SEA had, prior to 1970, refused to enforce Title I requirements because the elected chief state school officer did not want to antagonize LEAs. Therefore, every LEA application was automatically approved with little or no questioning from the SEA. Based on severe audit exceptions and a letter from the Commissioner of Education, which criticized, among other things, this refusal to adequately perform its responsibilities, the SEA changed its policy. A newly elected chief state school officer gave the Title I Director permission to enforce and the SEA's policy changed. This change in policy is evident in written state policies and procedures. With the support of the new chief state school officer, the SEA was willing to devote time to fulfilling its application approval responsibilities.

In general, we have concluded that the state legal framework in many states included in the study reflects both some influence from OE Review Team reports and HEW Audit Agency reports and some influence from the tradition of LEA autonomy and local control of education.

C. The State Legal Framework for Different SEA Functions Varies Widely in Quality and Comprehensiveness

The Legal Standards Project has concluded that state legal frameworks for state administration vary widely in quality and comprehensiveness from state to state and from function to function.

In many of the states not all the SEA functions and/or all aspects of a particular SEA function were interpreted. Thus, for example, in one state which developed comprehensive policies and procedures explaining application approval, no comprehensive policies or procedures were developed for audit resolution or complaint resolution.

A second state developed comprehensive policies and procedures for monitoring and application approval, but virtually no state policies or procedures for enforcement.

A third state developed written audit resolution procedures that provide that

(1) Routine audit settlements will be initiated by the program director or supervisor.

(2) Major audit settlements will be initiated by the program director or supervisor with the approval (written or verbal) of the chief SEA fiscal officer.

(3) Program directors or supervisors will be responsible for all audit settlements, follow-ups and close-outs under their jurisdiction.

(4) All audits should be closed within 90 days after they are received from the SEA audit office. Any exceptions to this must be approved by the chief SEA fiscal officer.

(5) All audits that have not been settled within 90 days must be verified by the SEA audit office for justification for non-settlement.

(6) A written statement from program directors or supervisors will be forwarded to the SEA audit office indicating that the audit is thereby closed.

Most other states had no written audit resolution procedures.

We found that one explanation for the lack of comprehensive development of SEA policies may stem from the inordinate amount of time taken up with interpreting the federal legal requirements for LEAs. SEAs which developed comprehensive written policies spent a significant amount of time doing so because of the need to "discover" the meaning and scope of the various standards and operative definitions which were not always clearly set forth in the federal legal framework. This, of course, is a major deterrent to the development of comprehensive policies and procedures by SEAs with respect to other functions. The time spent "discovering" federal policies could be better spent, for example, providing technical assistance respecting the actual educational strategies proposed and implemented by the LEAs.

In our recommendations concerning specific SEA functions, we have recommended that the SEAs assume increased technical assistance responsibilities. These responsibilities will be difficult for SEAs to perform satisfactorily if they must spend great amounts of time performing the interpretation function, i.e., explaining the applicability of specific federal requirements to particular fact situations.

We have concluded, in a separate paper prepared by the Project,[144/] that OE must assume the responsibility for clarifying LEA program requirements and explaining how they apply to the range of educational programs and services for which LEAs may use Title I funds. This clarification will facilitate the performance of certain other SEA functions, e.g., application approval, technical assistance, monitoring, auditing, and enforcement.

D. The Review and Analysis of the State Legal Framework for State Administration of Title I Suggest that Some SEAs May Not be in Full Compliance with All the Legal Requirements for State Administration of Title I

The Legal Standards Project has concluded, based on our review and analysis of the state legal framework for state administration that some SEAs may not be in full compliance

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[144/] See An Analysis of the Basis for and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965, (September, 1977).

with all the legal requirements for state administration. We note that this general conclusion is based on the content of the state legal framework, not on a compliance review of state practices. Set forth below are representative examples that support this conclusion.

With respect to SEA compliance with the legal requirements for application approval, we found, after analyzing application forms, checklists, and procedures, that some SEAs may be approving applications that do not meet each of the Title I requirements. In general, we found that some states use application forms that do not require the LEA to submit any information about needs assessment was required in the FY 76 application. However, the SEA had added a needs assessment page to its FY 77 application. Other application forms used by some SEAs also did not solicit information about Title I requirements, e.g., comparability or certain LEA assurances.

It is difficult to understand how a SEA application or annual program plan can assure OE that each LEA application approved by the SEA meets Title I requirements if the application form does not solicit any information from which the SEA can make a "determination" that the application meets Title I requirements.

As for SEA compliance with the required scope of auditing, i.e., fiscal and compliance, we found from a review of SEA audit polices and SEA audits that several SEAs appear to be conducting only fiscal audits and not audits that determine "compliance with applicable statutes, regulations, and terms and conditions of grants."[145]

Although this is not a compliance study, we have concluded, based on a content analysis of the state legal framework, that some SEAs may not be in full compliance with all the legal requirements for state administration of Title I.

IV. Recommendations Concerning the Federal Legal Framework

The Legal Standards Project's findings and conclusions about the state legal framework formed the basis for recommendations concerning the federal legal framework. However, since the state legal framework was only studied to determine how states had interpreted federal requirements, we present no general recommendations concerning the state legal framework.

Our general findings and conclusions about the federal legal framework focused on its interrelatedness, clarity, and sufficiency. Our recommendations flow from these findings and conclusions.

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[145] 45 C.F.R. §100b.301(h)(1975).

With respect to the interrelatedness of the requirements for state administration of Title I, we recommend generally that OE make such amendments to the federal regulations as may be necessary to explain clearly how different SEA functions relate to one another and how this interrelatedness should be reflected in SEA administration of Title I. Specific recommendations concerning the interrelatedness of SEA functions are contained in the chapters analyzing SEA functions in Part III of this paper.

With respect to the clarity and sufficiency of the legal framework for state administration of Title I, we recommend generally that (1) to the extent OE wishes an SEA to perform a function, it provide clear express authority, rather than implied authority, for that function; (2) where the scope of an aspect of a function is not clear, OE clarify it; and (3) where minimum standards are not set forth for an aspect of a function, OE provide them. Specific recommendations concerning the clarity and sufficiency of aspects of SEA functions are contained in Part III of this paper.

In addition, we propose three major recommendations concerning the United States Office of Education's administration of Title I.[146]

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[146] Similar recommendations concerning USOE's administration of Title I are contained in An Analysis of the Basis for and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965, (September, 1977).

First, we recommend that, where appropriate for SEA administration, OE include under substative requirements set forth in regulations, illustrative examples of the application of requirements to commonly occurring situations.[147] This technique is commonly used by other agencies for clarifying complex requirements.[148]

Second, a separate section entitled "interpretations", should be included in the regulations.[149] Thus, whenever OE issues an official interpretation of a requirement concerning state administration, that interpretation could easily be located in the regulations.

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[147] Areas where this may be particularly appropriate include rulemaking, grant distribution, enforcement, e.g., audit resolution, withholding, etc.

[148] *See*, e.g., regulations published by the Internal Revenue Service in Title 26 of the *Code of Federal Regulations*.

[149] As explained *supra*, in accordance with the Education Amendments of 1976, Section 431 of the General Education Provisions Act now requires, among other things, that all "interpretations" be published in the *Federal Register*. In addition, Section 431 of the GEPA Statute presently requires that OE treat "interpretations" in the same manner as it treats substantive regulations with respect to publication in the *Federal Register* of a notice of proposed rulemaking, comment period, republication and submission to Congress. We recommend that Section 431 of GEPA be amended to require that OE "interpretations" simply be published in the *Federal Register*. OE should not be required to first publish their interpretations in proposed form subject to comments, republication and submission to Congress since, interpretations, unlike substantive rules, do not have the "full force and effect of law." Recall that a substantive rule implements the statute; whereas interpretations simply advise the public of the agency's construction of the statutes and rules which it administers. Moreover, application of burdensome procedures to interpretations discourages rather than encourages interpretation by OE when issues need clarification. Our

[footnote continues]

It should be noted that we do not recommend that the language of the existing regulations be totally discarded and less legally-based language substituted. The language of many of the regulations has been in existence for approximately eight years. Over time, most agencies have become familiar with these terms, although they may not always understand their precise implications or application. It is our opinion that less dissonance and more clarity would result from explaining the operative definitions, concepts, and standards set forth in present regulations than from totally revising the phraseology. Of course overly complex sentences in present regulations should be simplified. On several occasions such recommendations are made in our paper. We submit, however, that a complete revision would not be productive and would likely result in greater confusion than clarification.

[footnote continued from previous page]

recommendation that OE be required simply to publish its "interpretations" in the Federal Register and not follow the procedure applicable to other substantive rules is not exceptional in any sense of the word. OE "interpretations" would then be subject to the same procedures most other federal agencies now follow under sections 552 and 553 of the Administrative Procedures Act (5 U.S.C. 552,553).

Finally, we recommend that Congress require OE to prepare a policy manual for use by OE staff, HEWAA staff, SEAs, LEAs, and parents. The precedent for the development of a policy manual is firmly established within the federal government.

The manual should include, at a minimum (1) quotations of relevant sections of the Title I and GEPA statutes; (2) quotations of relevant regulations appearing in the Code of Federal Regulations or the Federal Register; (3) explanations of the purpose of each requirement, with references to the legislative history, where relevant; (4) summaries of OE responses to SEA requests for interpretations, including examples of actual applications of the standards and operative definitions set forth in the regulations; (5) summaries of final decisions rendered by the HEW Audit Hearing Board; (6) final determinations made by OE concerning audits closed without reaching the Hearing Board; and (7) summaries of relevant court decrees.

The Policy Manual should also specifically address LEA and SEA requirements. With respect to LEA program requirements,[150] the manual should be organized by requirement, and by subject or topic areas, including, for example: "teacher aides", "support services", "pull-out programs", "in-class programs", "desegregation", "individualized instruction", "in-service training", "programs in open-space schools", etc.

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[150] See An Analysis of the Basis for and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965, (September, 1977).

The manual should also explain the various alternative program design models available to LEAs and, more importantly, describe the kinds of records they must maintain so as to leave a sufficient "audit trail" when and if the HEWAA undertakes an audit. This latter section should be prepared jointly by OE and the HEW Audit Agency.

The suggestion that a manual be developed is based on the premise that the LEA requirements are minimum process standards which do not restrict innovative programs which are (1) of sufficient size, scope, and quality to ensure a reasonable promise of success, and (2) are designed to best meet the special educational needs of the greatest number of educationally deprived children. We reviewed state manuals containing certain overly restrictive policies which had the effect of limiting LEA flexibility and went beyond the federal legal framework in their reach. Such a manual, developed by OE, would be consistent with Congressional intent not to interfere with the control of local school systems by the federal government; instead, it would help to eliminate the constraints on local discretion resulting from uncertainty about Title I requirements.

The OE correspondence we reviewed strongly supports the feasibility of developing a manual that facilitates innovation and creativity rather than discouraging it.

With respect to SEA functions, we recommend that the manual contain a section on SEA administrative requirements organized by functions. We further recommend that this section contain model instruments and procedures for different SEA functions. For example, it should contain a model application, a model application review checklist, a model monitoring instrument, model audit resolution procedures, and model procedures for interrelating SEA functions.

PART III

ANALYSIS OF THE MAJOR REQUIREMENTS APPLICABLE TO STATE ADMINISTRATION OF TITLE I

PART III: ANALYSIS OF THE MAJOR REQUIREMENTS APPLICABLE TO STATE ADMINISTRATION OF TITLE I

INTRODUCTION TO PART III

Part I of this paper sets forth the general purposes of this paper and the basic definitions used throughout the paper. Part II of this paper includes our general conclusions and recommendations concerning the interrelatedness, clarity and sufficiency of the federal legal framework for state administration of Title I.

Part III of this paper includes an in-depth analysis of the clarity, sufficiency, and interrelatedness of each major function SEAs are required to perform in administering Title I. This Part includes nine chapters, each focusing on a particular SEA function or functions. Each chapter contains a description of the relevant sections of the existing federal legal framework, the legal frameworks developed by the states included in our survey, and the project's analysis concerning the efficacy of the existing federal legal framework, i.e., what additions, deletions, or clarifications are needed in order to improve the federal legal framework for state administration of Title I.

With respect to recommendations concerning particular SEA functions, it should be noted that many of these recommendations could be implemented through amendments to regulations. In such cases, we have generally recommended that regulations be amended to accomplish this. However, it is equally clear that some of these recommendations could be implemented through statutory amendments. It is possible that, after ten years of OE experience with various amendments to the regulations, Congress may determine that statutory amendments are a more appropriate means of resolving certain issues that have not been fully clarified through regulations.

The major SEA functions analyzed in this paper were generally described _supra_, in Part I. The detailed analysis of these requirements will be presented in Part III in the following sequence:

Chapter 1: SEA Approval of LEA Applications
Chapter 2: SEA Rule Making and Interpretation
Chapter 3: Technical Assistance
Chapter 4: Monitoring
Chapter 5: Grant Distribution
Chapter 6: SEA Enforcement
Chapter 7: Financial Management
Chapter 8: Evaluation
Chapter 9: SEA Reporting to the Federal Government/ Complaint Resolution

CHAPTER 1

SEA APPROVAL OF LEA APPLICATIONS

CHAPTER 1
SEA APPROVAL OF LEA APPLICATIONS

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CHAPTER 1
SEA APPROVAL OF LEA APPLICATIONS

I. Introduction

This introduction to the review and analysis of the federal and state legal framework for application approval contains (1) an overview of the federal legal framework; (2) a discussion of the organization of the Chapter; and (3) the major issues, findings, conclusions and recommendations contained in the Chapter.

A. Overview of the Federal Legal Framework

The overview of the federal legal framework for SEA approval of LEA applications includes (1) the purpose and importance of the application approval requirement, and (2) the federal legal framework for application approval.

1. Purpose and Importance of the Application Approval Requirement

Application approval is one of several administrative functions that SEAs must perform under the Title I legal framework. It is unquestionably one of the most important, if not the most important, Title I functions performed by SEAs. It is the first step in enabling the SEA to determine whether a LEA has complied with the various program requirements before the LEA implements the Title I program or project described in the grant application.[151] In addition, the review and approval of a LEA application the SEA an opportunity to comment on the quality of the proposed program or project and places the LEA on notice as to the practices which would be considered acceptable under the Title I legal framework

Application approval is also important because of the legal significance of SEA approval of applications and because of the relationship of application approval to other SEA functions, e.g., monitoring, technical assistance, enforcement, and auditing.

With respect to the legal significance of SEA approval of an application, the Title I application submitted to the SEA by the LEA is a grant document which, when approved, constitutes an agreement that the LEA will use Title I funds in accordance with the statute and regulations.[152] "Grant, as defined in federal regulations, means "an agreement between the Federal Government and a State or local government whereby the Federal Government provides funds or aid in kind to carry out specified programs, services or activities."[153] Thus, the SEA act of approving the LEA application is an act of legal significance that seals an agreement between the SEA and the LEA.

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[151] Full compliance with all Title I requirements obviously cannot be determined by only a review of the LEA application. However, the SEA can determine whether the content of the LEA application satisfies requirements for what must be contained in the LEA application.

[152] ESEA Title I Program Support Package for Title I ESEA Applications.

The LEA must submit an application containing certain facts and information demonstrating that it will comply with the requirements of Title I. The SEA must then review the application and determine, on the basis of information provided in the application that each Title I requirement has been met by the application. If the SEA finds sufficient evidence in the application that each Title I requirement has been met, then it can approve the application. If the SEA does not find sufficient evidence that each requirement has been met, then it cannot legally approve the application until the require-

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153/ 45 C.F.R. Part 100b. App.B Part I(1975). It is clear that the United States has authority to fix the terms and conditions upon which federal funds allotted to states shall be disbursed. King v. Smith, 392 U.S. 309 (1968). At least two federal district courts have held that the United States has standing to seek judicial enforcement of the terms and conditions of federal grants under a contract theory and that the administrative remedy of withholding funds was not intended to be and was not an exclusive remedy. U.S. v. Frazer, 294 F. Supp. 319 (M.D. Ala. 1968), 317 F. Supp. 1084 (1970); U.S. v. Sumter County School District, 232 F. Supp. 945 (E.D. S.C. 1964); contra; U.S. v. Madison County Board of Education, 326 F. 2d 237 (1964) cert. denied 379 U.S. 929 (1964).

ments are met.[154]

The effect of SEA approval of a LEA application that does not meet Title I requirements can include unfavorable OE Review Team Reports; costly audit exceptions and review by the Title I Audit Hearing Board; a determination that the federal government must be reimbursed for illegal expenditures; burdensome administrative attempts to remedy improperly approved and illegally functioning Title I projects; or even litigation by Title I children and parents seeking to insure that Title I requirements are met.[155]

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[154] In practice, the finding that an application does not meet these requirements does not mean that the application is rejected. Instead, negotiations between the SEA and the LEA often produce corrected or revised applications that meet the legal requirements. See, e.g., Title I ESEA: How It Works, A Guide for Parents and Parent Advisory Councils, DHEW Publication No. OE 73-07104, 42(1973).

[155] Improper SEA approval of LEA applications has been an issue raised frequently in Title I litigation. Improper SEA approval has been alleged in many complaints and proper SEA approval has often been part of the relief requested in Title I lawsuits. See e.g., Barrera v. Wheeler, 417 U.S. 402(1974); Lopez v. Luginbill and Roswell Indep. School District, 483 F. 2d 486 (10th Cir. 1973); Nicholson v. Pittenger, 364 F. Supp. 669 (E.D. Pa. 1973); Rosario v. Weinberger, Civil Action No.74-922 (D.P.R., filed August 6, 1974); Beaudreau v. Weinberger, Civil Action No. CV 74-1475-R (C.D. Ca., filed May 28, 1974); Guadalupe Org. Inc., v. Tempe Elem. School District #3, Civil Action No. 740423 PHX I (D. Ariz., filed July 18, 1974); Natonabah v. Bd. of Ed., Gallup-McKinley City School Dept., Civil Action No. 8925-71 (D.N. Mex., Feb. 8, 1973); Forrest v. Ukiah Unified School Dist., Civil Action No. 72-1619 WTS (N. D. Ca., filed Dec. 13, 1972); Kerht v. Grile, Civil Action No. 71 F 142 (N.D. Ind., filed Dec. 23, 1971); Smith v. Richardson, Civil Action No. 6978 (D.Ken., filed June 15, 1971); Denetclarence v. Bd. of Educ. Indep. School Dist. #22, Civil Action No. 71-8872 (N D. Miex., filed April 2, 1971); Poole v. Rochester City School Dist., Civil Action No. 1971-55 (W.D.N.Y. filed Feb. 12, 1971): Cantu v. Saunders, Civil Action No. 2773 (E.D. Wash., filed September, 1971); Colpitts, v. Richardson, Civil Action No. 1838-70 (D. Me. 4410-70 (D.R.I., filed 1971).

Furthermore, application approval is important because of its relationship to other SEA functions. Proper SEA approval of Title I grant applications submitted by LEAs can short-circuit problems of LEA compliance with Title I requirements. Careful SEA scrutiny of LEA applications coupled with any necessary corrections constitutes a form of technical assistance that can identify and remedy problems prior to implementation. In addition, a properly approved LEA application can form the basis for SEA monitoring or auditing of Title I activities conducted by LEAs. If proper approval of an application is granted by the SEA, then the LEA knows what is acceptable and what is not acceptable. Consequently, the LEA should feel confident that if the Title I program or project is implemented in accordance with a properly approved application and with Title I requirements, there should be little problem with major violations discovered during monitoring visits or with large audit exceptions resulting from an audit of the LEA.

Also, for many states with large numbers of LEAs and limited SEA staff, application approval affords an annual opportunity for close contact with a LEA. Thus, application approval presents a natural opportunity to enforce Title I requirements by either delaying approval until an application is amended to conform to Title I requirements or finally disapproving an application which does not meet Title I requirements.

For these reasons, it is in the interest of the SEA, the LEA, and Title I children that the SEA perform the application approval function in a manner that produces Title I programs and projects conforming to legal requirements.

2. The Federal Legal Framework

Under the formal Title I legal framework, the SEA is responsible for determining whether a project application for financial assistance submitted by an LEA complies with the program requirements set forth in the Title I legal framework.

The Title I legislation provides, in relevant part, that each SEA must submit an application providing "satisfactory assurance" that

> payments . . . under Title I will be used only for programs and projects which have been approved by the State educational agency pursuant to Section 141(a) and which meet the applicable requirements of that section . . . 156/

The statute also provides, in relevant part, that an LEA may receive a grant under Title I:

> only upon application therefor approved by the appropriate state educational agency, upon its determination (consistent

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156/ Section 142(a)(1) of Title I (20 U.S.C. 241f(a)(1)). Section 141(a) of Title I (20 U.S.C. 241e(a)) contains the basic Title I program requirements with which LEAs must comply, e.g., excess costs, concentration, eligibility, supplemental use of funds, comparability, evaluation, annual reports and records, access to records, dissemination of information, and parent advisory councils. Section 141(a) also governs payments for planning, projects involving construction, coordinated training of education aides and professional staff, and LEA assurances with respect to control of funds and title to property.

> with such basic criteria as the Commissioner may establish) 157/

that the LEA has complied with (1) the requirements of Section 141(a) and (2) the basic criteria established by the Commissioner in regulations and program guidelines.

The role of the SEA in approving LEA applications under Title I has been recognized in the legislative history of Title I. The Senate and House Reports accompanying the original legislation in 1965 used identical language to describe this function:

> under the terms of the legislation, the state agency determines whether or not the programs and projects submitted by local school districts are designed to further the purposes of Title I 158/

The legislative history of the Education Amendments of 1969 stated, with respect to the SEA role in approving LEA applications under Title I, that:

> it is the duty of the State agency to inform local agencies about weaknesses in their applications, and, ultimately disapprove those which are not consistent with the purposes and intent of the law 159/

157/ Section 141(a) of Title I (20 U.S.C. 241e(a)).

158/ S. Rep. No. 146, 89th Cong., 1st Sess. U.S. Code Cong. and Adm. News (1965), 1453, and H.R. Rep. No. 143, 89th Cong., 1st Sess. (1965), 4.

159/ S. Rep. No. 91-634, 91st Cong., 1st Sess. U.S. Code Cong. and Adm. News, (1970), 2775.

The importance of this SEA function was highlighted in this same Senate Report, which stated that:

> This committee's review of the operation of Title I indicated that a weakness in the operation of Title I lies in the approval process at the State level. Consideration was given to legislation which would have dealt with this weakness; however, it is the opinion of this committee that present law . . . provides the Commissioner with sufficient authority to deal with the situation. For this reason the committee does not recommend a change in present law, but does recommend that the Commissioner strengthen the basic criteria controlling the approval of applications 160/

Pursuant to Section 141(a), the Commissioner has promulgated regulations and program guidelines which further clarify the application approval function.

The Title I regulations in effect during the state interviews provide that the SEA "shall review all applications by LEAs. . . to determine whether such applications meet the requirements of the Act and the regulations" governing Title I project applications. 161/ The regulations further require that an SEA "shall not approve such an application

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160/ *Id.*, 2783.

161/ 45 C.F.R. §116.34(a)(1975). 45 C.F.R. §116.5(a)(1976) now provides that the SEA "shall review all applications by applicant agencies except for an applicant agency under Part 116d."

unless it determines (1) that the application does "effectively meet the requirements" of the Act and the regulations governing project applications[162] and (2) that the SEA has given the Commissioner certain assurances required by the Act and the regulations.[163]

In addition to the above requirements concerning application approval, the regulations in effect during the state interviews also provide that:

(a) The terms of each "approved" application must be made available for public inspection by the SEA and LEA.164 /

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[162] Id. 45 C.F.R. §116.5(a)(1976) now states that the SEA "shall not approve an application (1) for an amount which together with amounts of other approved applications by that agency, exceeds the amount available for grants to that agency determined in accordance with Title I or (2) unless it has determined that the application meets all of the applicable requirements of Title I and the regulations."

[163] Id. 45 C.F.R. §116.3(1976) now governs assurances which must be contained in the general application and the annual program plan. See 45 C.F.R. §100b.17 (General Application) and 100b.18 (Annual Program Plan) (1976). See also proposed amendments to 45 C.F.R. §100b.17 (41 F.R. 56974 et. seq., December 30, 1976).

(b) The amount of the approved application may not exceed the amount of funds made available for the LEA.165 /

(c) Before a SEA may finally disapprove a LEA application, in whole or in part, it must afford the LEA reasonable notice and an opportunity for a hearing.166 /

(d) The SEA may not disapprove an application, in part or for less funds than is called for, if the effect would be to alter the project to such an extent that "it no longer provides reasonable promise of substantial progress toward meeting the special educational needs of educationally deprived children."167 /

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164 / 45 C.F.R. §116.34(d)(1975). 45 C.F.R. § 116.5(e)(1976) now provides that not only must the application be available to the public, but also "the related documents referred to in parts 116a, 116b, 116c, and 116d; and the evaluation and other reports referred to in such parts shall be made available to the public by SEA in the manner prescribed by Section 116.35." [The reference to Section 116.35 appears to be a technical error. Section 116.45, "Public Information", appears to be the reference intended by this provision.]

165 / 45 C.F.R. §116.34(a)(1975). 45 C.F.R. §116.5(a)(1976) now slightly modifies the wording of this provision.

166 / 45 C.F.R. §116.34(c)(1975). See also §425 of the General Education Provisions Act. 45 C.F.R. §116.5(c) (1976) now clarifies the application of §425 of GEPA to Title I: the notice preceding the hearing by the SEA must include the reasons for the proposed disapproval. The SEA must hold a hearing 30 days after it receives a request from the LEA. If the SEA decides not to rescind its final action, it must give written notice, including the reasons, to the LEA and must indicate the right to appeal to the Commissioner within twenty days of the receipt of the notice.

167 / 45 C.F.R. §116.34(b)(1975). This provision has been deleted from the new regulations.

(e) The SEA may not approve an LEA application "unless it determines that the (SEA) is able to give the assurances with respect to that application which is required by the regulations in this subpart." 168/

(f) The LEA must provide satisfactory assurance to the SEA with respect to control of funds and property. 169/

(g) The LEA must provide an assurance that it will give the SEA an annual report and such other reports as may be reasonably necessary to enable the (SEA) to perform its duties under Title I of the Act, including the measurements of educational achievement and program effectiveness required. 170/

(h) The LEA must give an assurance that comparability will be maintained 171/ and that the amount of textbooks, library resources, and other instructional materials will be comparable. 172/

168/ 45 C.F.R. §116.34(a)(1975). See 45 C.F.R. §116.5(a)(2) (1976).

169/ 45 C.F.R. §116.20(c)(1975). See 45 C.F.R. §116.42(c) (1976).

170/ 45 C.F.R. §116.23(1975). See 45 C.F.R. §116.46 (1976).

171/ 45 C.F.R. §116.26(a) and (e)(1)(1975). See 45 C.F.R. §116a.26(h)(i)(1976).

172/ 45 C.F.R. §116.26(a)(3)(1975). See 45 C.F.R. §116a.26 (h)(3)(1976) which replaces the previously required assurance with a requirement that the LEA file with the SEA "a statement of the specific policies and procedures adopted by the LEA to assure that textbooks, library resources, and other instructional materials are provided for each school serving a Title I project area on a basis that is comparable to that for non-project schools."

(i) The LEA must give an assurance that Title I activities will be carried out on a non-discriminatory basis and that, where appropriate, Title I activities will be carried out in accordance with applicable court orders or desegregation plans filed with OE.173/

(j) The LEA must give an assurance that Title I funds will supplement, not supplant, state and local funds; "the use of the grant funds will not result in a decrease in the use for educationally deprived children residing in that project area or State or local funds, which in the absence of funds under Title I of the Act, would be made available for that project area and that neither the project area nor the educationally deprived children residing therein will otherwise be penalized in the application of State and local funds because of such a use of funds under Title I of the Act."174/

173/ See 45 C.F.R. 80.4(1975).

174/ 45 C.F.R. §116.17(h)(1975). See 45 C.F.R. §116.40(a)(1)(1976) which repeats this requirement and §116.40(a)(2) which states that no Title I project shall be approved unless federal funds made available for that project "(i) will be used to supplement, and to the extent practical, increase the level of State and local funds that would, in the absence of Federal funds, be made available for the education of pupils participating in the project; (ii) will not be used to supplant State and local funds available for the education of such pupils; and (iii) will be used solely to pay the excess costs of programs and projects assisted under Title I."

In addition to the legislative history and the regulations promulgated to implement the application approval function, Title I program guides have emphasized the SEA's duty with respect to approving applications. An early program guide, Program Guide #36, emphasized the SEA's application approval responsibilities by stating that:

> The SEA will review each proposed project and determine whether or not it meets the Title I size, scope and quality requirements in accordance with the foregoing criteria and such other criteria as the SEA may apply. A project which fails to meet such criteria, or which in the professional judgment of the State agency will be ineffective, should be rejected with appropriate suggestions for revision. 175 /

Program Guide #36 was superseded by Program Guide #44, the most important program guide for application approval purposes.[176/] Program Guide #44 stated that:

175/ ESEA Title I Program Guide #36, (April 14, 1967) governed criteria for the approval of LEA Title I applications. It was superseded by ESEA Title I Program Guide #44, "Revised Criteria for the Approval of Title I, ESEA, Applications from Local Educational Agencies" (March 18, 1968).

176/ ESEA Title I Program Guide #44 (March 18, 1968) was redesignated as Instruction L.203.1 by ESEA Title I Program Directive Notice A102 (September 26, 1972).

> Title I . . . requires that the State educational agency make certain determinations consistent with such basic criteria as the Commissioner may establish . . . . [177]

The program guide set forth criteria which were developed to "meet the need for a set of general statements of the essential characteristics of an approvable Title I program"[178] (emphasis added). Each criterion is stated as an affirmative "finding" and each is followed by "an explanation of some of the factors to be considered in developing a program that will meet the criterion."[179] The findings cover such areas as: the selection of attendance areas, comprehensive needs assessments, planning, coordination, program design, concentration, program objectives, eligible children, inservice training, coordinated training of staff and aides, parental involvement, construction, equipment, information dissemination, evaluation and supplanting.

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[177] *Id.* at 1.

[178] *Id.*

[179] *Id.*

In addition, Program Guide #44 directs SEAs to "review the application and advise the applicant which criteria, if any, have not been met. Unless the State educational agency finds that each criterion has been met, the application may not be approved."[180]

Program Guide #45A, a subsequent program guide, stated that:

> In reviewing Title I proposals the SEA should be particularly alert to the following indications of violations of basic Title I requirements:
>
> (1) The applicant proposes to provide Title I services to children who do not reside in areas determined to be eligible for Title I, ESEA, service.
>
> (2) The proposed activity or activities appear not to be related to any special need or to any defined objective for the development of children with a particular need.

180/ Id. OE has indicated that SEAs could establish additional criteria, not inconsistent with Title I. ESEA Title I Program Guide #24,8.1 authorized SEAs to "establish criteria and disseminate them for the guidance of local educational agencies." The Program Guide also stated that "the State agency may state that a particular practice or policy is "desirable", it may also advise the local educational agencies of the specific or general criteria on which project proposals involving such a practice or policy will be evaluated, and it may apply such criteria in the approval of projects instead of letting such agencies decide for themselves." Program Guide #24 was cancelled by ESEA Title I Program Directive Notice A102 (September 26, 1972). See Chapter 2 (SEA Rule Making and Interpretation) infra, for a discussion of SEA authority to promulgate criteria.

(3) The proposal includes little or no information about the involvement of parents, community and local agency representatives and private school officials in the planning of the local Title I program.

(4) The proposal is either ambiguous or inadequate with respect to provisions for the participation of children in private schools.

(5) The applicant proposes to curtail expenditures of State and local funds for certain services, and, in effect, to substitute Title I funds in order to maintain those same services in the Title I areas.

(6) The applicant is proposing to use Title I funds to provide in the project areas services that are already being provided or that will be provided in the non-project areas with State and local funds.[181]

In addition, Program Guide #45A also stated that:

> The Title I Criteria (Program Guide #44) should be in the hands of every local agency. Your agency should insist on compliance with the criteria and should not hesitate to reject a project that fails to meet the criteria.[182]

The informal legal framework for application approval includes, among other things, the model application developed by OE, Title I handbooks, guidelines, publications, OE Review

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[181] ESEA Title I Program Guide #45A, "Insuring the Proper Use of Title I, ESEA Funds in 1970 Programs", 1-2, (July 31, 1969).

[182] Id. at 1.

Team Reports, program information notices and program support packages. These materials reflect OE policies and interpretations.

In 1968 OE developed a model application to assist SEAs in carrying out their application approval responsibilities. However, SEAs were not required to use it. To the best of our knowledge, this model application has not been amended or modified to reflect subsequent statutory amendments or changes in federal regulations.

One handbook, specially designed for State Title I officials, is Title I, ESEA Reviewing Project Applications. It identifies and states the Title I requirements and "suggests questions the SEA should ask in determining whether the applicants' proposed program meets the requirements."[183] The areas covered include maintaining effort; selecting eligible school attendance areas; conducting a needs assessment; involving parents; and developing the program. Other subjects related to program implementation are included: choosing locations and staff; acquiring equipment and constructing facilities; evaluating the program; disseminating information about the program and reporting on the program.

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[183] Title I, ESEA Reviewing Project Applications: Handbook for State Title I Officials; ii.

Application approval was also referred to in early Title I guidelines, i.e., Guidelines: Special Programs for Educationally Deprived Children:

> It is the responsibility of State educational agencies to assure that all proposals meet certain statutory requirements set forth in Section 205(a) of the title and are in other respects correct according to the law and the regulations. If the State educational agency cannot assure that a project meets these requirements, the proposal must be revised or disapproved. The State agency may return a project with specific recommendations for its revision or modification. The State agency shall not finally disapprove an application in whole or in part without providing the local agency reasonable opportunity for a hearing. 184/

These guidelines also quoted early Title I Regulations that gave guidance to SEAs about the effective data that funds could be obligated and that implied that the effective date of approval for an LEA application was the date on which the application was received by the SEA in "substantially approvable" form. 185/

Another publication, Title I ESEA: How It Works notes

184/ Guidelines: Special Programs for Educationally Deprived Children, Elementary and Secondary Education Act of 1965/Title I, OE-35079, 21, (1966). These Guidelines were in effect until February 1972.

185/ Id. 6, quoting 45 C.F.R. §116.46(d).

that "Each state designs its own application, but certain items must be included."[186/] These items include:

- Evidence of maintenance of effort . . .
- Data indicating [comparability] . . .
- Data to support the selection of eligible attendance areas . . .
- Needs assessment data . . .
- Description of the involvement of non-public school children . . .
- Description of the parental involvement . . .
- Description of the project . . .
- Plans for disseminating information . . .
- Budget summary . . .
- Equipment inventory . . .
- a promise in the application to control all Title I funds, to own all equipment purchased with Title I money, to submit our annual report and any other reports requested to the SEA, and to prevent discrimination in Title I activities. 187/

186/ *Title I ESEA: How It Works, A Guide for Parents and Parent Advisory Councils*, DHEW Publication No. (OE) 73-07104, II, (1973).

187/ *Id*.

The same publication later describes "specific points that the state must look for in determining whether a school district's applications may be approved." These "specific points" include the previously mentioned "items that must be included," but also include considerations about project design, supplanting, construction, planning, evaluation, and public information.[188/]

The publication refers to these "specific points" in terms of:

> their importance in judging the legality of a Title I project. If the state does not find evidence in the application that these points have been followed, then it cannot approve the district's Title I application. This does not necessarily mean that the application is rejected. The State education agency will always try to work with local school officials to help them revise their application and conform to Title I law and regulations. Even if an application is not approved, the school district has a right to request a hearing on the rejection. [189/]

Title I, ESEA: How It Works also supplied a definition of "application":

> An application is a legal document submitted by the local school district to the State Department of Education for approval . . . . The application describes the districts or State's project. It must include a description of

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188/ *Id*. 41-42

189/ *Id*. 42

> each component making up the Title I project, a detailed budget plan, an evaluation plan, and various assurances that all Title I rules have been followed. 190/

OE has also used its program reviews of state administration of Title I to provide policy guidance to SEAs about the application approval function. For example, an OE Review Team Report of one state included in the study pointed out that the SEA "review and approval of Title I applications submitted by the (LEAs) is carried out in a hasty and perfunctory manner which permits little or no opportunity for the type of critical analysis and thorough review necessary to the valid and effective operation of Title I."

In a letter accompanying the report sent to the Chief State School Officer, the Commissioner observed that corrective action was required and directed the SEA to "develop procedures for the review of Title I applications (including appropriate criteria) which will assure that only those applications which meet the requirements of the statute and regulations are approved by the State." The Commissioner further stated that "no further Title I applications or amendments thereto should be approved until the instructions and procedures referred to above have been developed by the

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190/ Id. 65.

State and reviewed by this office."

Other problems with SEA performance of the application approval function have been brought to the attention of SEAs by OE's program information system, now incorporated into the program directive system. In one such program information notice Chief State School Officers were asked to:

> take necessary steps to determine if any of the following deficiencies exist in your state and to initiate remedial action where indicated . . . . 1. Unsystematic review of project applications, many of which do not provide adequate documentation for selection of target attendance areas, needs assessments, or program quality . . . 3. Lack of procedures to ensure improved evaluation . . . including techniques for incorporating more promptly the results of such evaluations into the application review process. 191/

OE has also issued a program support package concerning Title I applications. The program support package describes the LEA project applications as "the legal document approved by the State for local implementation. It is the primary document for use by the SEA in monitoring. Each of the compliance aspects of the LEA's program must be sufficiently documented to enable the SEA to judge its completeness and appropriateness." 192/

191/ ESEA Title I Program Information #313, "Title I Management Problems", 1 (May 6, 1971). Program Information #313 was redesignated as ESEA Title I Inst. A107.1 by ESEA Title I Program Directive Notice A102 (September 26, 1972).

192/ ESEA Title I Program Support Package for Title I ESEA Applications.

SUMMARY OF KEY SEA RESPONSIBILITIES

In short, the formal legal framework requires the SEA to review each LEA application and to make a determination that the application meets each of the various LEA program requirements or criteria set forth in the Title I statute, regulations, or guidelines. If the SEA finds that an LEA application does not comply with Title I requirements or criteria it must advise the LEA about necessary corrections or amendments. If these corrections or amendments are not made or do not meet Title I requirements, then the SEA ultimately may finally disapprove the application. However, before the SEA may finally disapprove a LEA application, it must afford the LEA reasonable notice and an opportunity for a hearing.

B. Organization of the Chapter

Part I of this Chapter has set forth an overview of the federal legal framework for application approval. Part II of this Chapter analyzes the federal and state legal frameworks for application approval and discusses the effect of OE program reviews and HEW audits on SEA performance of the application approval function.

The analysis considers the clarity, specificity and scope of the application approval requirement; incorporates state interpretations as set forth in the state legal framework; and leads to several recommendations for amendments to the federal legal framework for approval of LEA applications by SEAs.

C. Major Issues, Findings, Conclusions, and Recommendations

The Legal Standards Project recommends, in part, that the Title I regulations be amended to (a) establish minimum standards for each LEA program requirement about which SEAs must make a determination when reviewing an application; (b) require OE to develop a model Title I application and review checklist; (c) require OE to develop a monitoring instrument to review the legal sufficiency of application forms; (d) require OE monitors to certify that application forms and assurances meet Title I requirements, and (e) require that certain statements be printed on the signature pages of application forms and assurances to remind those who sign applications of the legal significance of the application and the possible penalties for false, fictitious, or fraudulent statements in the application.

In addition, we have made recommendations concerning the effective date of SEA approval and the types of approval granted by SEAs; SEA procedures for revising or amending project applications or budgets; SEA deadlines for submission of LEA applications; and SEA procedures for interrelating application approval with other SEA functions. Furthermore, following our review of the impact of OE program reviews and HEW audits on SEA performance of the application approval function, we have recommended that OE and HEW efforts be strengthened in this area.

These recommendations are set forth in detail in Part II of this Chapter. A brief overview of the important issues and findings that led to the development of these recommendations is presented below.

The Title I legal framework for approval of LEA applications by SEAs is generally clear in that it requires SEAs to make a "determination" that a LEA application "effectively meets" the program requirements imposed on LEAs by Title I. We have concluded that SEAs would be aided in making their determinations if the Title I regulations governing LEA program requirements set forth minimum standards for each requirement that must be addressed in a LEA application.

We found that, despite the general clarity of the application approval requirement, some SEAs may possibly be approving applications that do not meet each of the Title I requirements. This finding is supported by our review and analysis of application forms, checklists, and assurances used by states included in the study. In general, we found that some states use application forms that do not request the information required by Title I for each program requirement. In addition, we found that some of the assurances required by Title I are not contained in the assurance forms used by some SEAs.

With respect to the effective date of approval and the types of approval granted by SEAs, we found varying state policies and procedures. One SEA had some Title I projects operating without approval as late as January or the spring. Some SEAs approved projects that were "substantially approvable"; others granted "conditional approval" or "approval pending clarification". We have concluded that, to the extent such situations result from a lack of clarity in the regulations about the effective data of approval or the types of approval that may be granted, additional specificity in the regulations is desirable.

We found that some states do not have written policies or procedures governing the revision or amendment of project applications or budgets. The need for such procedures is suggested by one OE program report that found that approximately 700 revisions had been made in 283 applications in one state. Some SEAs that had written policies or procedures made no mention in them of any role for parent advisory councils in revising or amending project applications or budgets.

We also found a wide variety of state policies in the area of SEA deadlines for the submission of LEA applications. We have concluded, based on our review of state materials and language contained in the now cancelled Program Guide #24, that submission deadlines are necessary to give the SEA adequate time to review and analyze LEA applications before making a "determination" that they "effectively meet" Title I requirements.

With respect to the interrelationship between application approval and other SEA functions, we found that the federal legal framework does not always fully develop the connections between application approval and other SEA functions, e.g., monitoring and auditing. We also found that the state policies and procedures generally reflect the federal legal framework's failure to develop fully connections between application approval and other SEA functions.

With respect to the impact of recent OE program reviews and HEW audits, we found that in some states they appear to have a positive effect on how the SEAs perform the application approval function. This finding was based on SEA responses about corrective action taken as a result of OE program reviews or HEW audits. However, because we have also found that some SEA application forms suggest that some SEAs may be approving applications that do not meet each Title I program requirement, we have concluded that OE and HEW should strengthen the program review and audit efforts aimed at application approval.

II. An Analysis of the Federal and State Legal Frameworks for Application Approval

A. The Clarity, Specificity and Scope of the Requirement

1. Introduction

The study of the federal and state legal frameworks for the application approval function revealed that (1) although the general requirement that SEAs must review and approve LEA applications is clear, some SEAs interpret and apply the requirement in a manner that appears to be inconsistent with Title I requirements and (2) the federal legal framework fails to provide adequate guidance with respect to certain procedural issues related to application approval. A discussion and analysis of these findings are set forth below with appropriate recommendations.

2. Despite the Clarity of the General Requirement, Some State Interpretations Do Not Appear to Enable SEAs to Make a "Determination" that a LEA Application "Effectively Meets" Each Title I Requirement

a. The Federal Legal Framework -- Section 141(a) provides that a LEA may receive a grant upon application approval by the SEA upon its "determination", consistent with Title I regulations and the Commissioner's criteria, that the LEA application complies with the requirements of Section 141(a) and the relevant Title I regulations. Although "determination' is not defined, it appears to mean that the SEA must determine upon a review of the application that each relevant Title I requirement has been met. The nature of the "determination" is obviously related to the clarity of the substantive program requirements that LEAs must meet.

The regulations governing application approval state that a SEA "shall not approve such an application unless it determines that the application does effectively meet the requirements . . ." [193/] Although the phrase "effectively

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[193/] The phrase "effectively meet" has been deleted from the new regulations and replaced with a requirement in 45 C.F.R. §116.5(a)(1976) that the SEA shall not approve an application ". . .(2) unless it has determined that the application meets all of the applicable requirements of Title I and the regulations." (Emphasis added.)

meet" is not defined, it appears to mean that each LEA application must comply with each relevant Title I program requirement and must contain the various assurances required by Title I.[194]

The Title I legal framework also specifically requires that each LEA application must contain assurances with respect to control of funds and property,[195] annual reports and such other reports as may be necessary,[196] supplanting,[197] and comparability.[198]

The federal legal framework for application approval is clear to the extent that it requires the SEA to review LEA applications and to make a "determination" that each application does "effectively meet" each of the Title I requirements. It is also clear that each application must contain information about specific Title I requirements. In general, what is not clear from the federal legal framework is what constitutes minimum standards for the quality of information that must be included in the application for each Title I program requirement. The absence of such minimum standards appears to make SEA performance of the application approval function more subjective than it would be if the legal framework contained such standards. This issue has been addressed for each Title I program requirement in another paper prepared as part of this study.[199]

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[194] *See* p. 112, *supra*.

[195] 45 C.F.R. §116.20(c)(1975); *see* note 169 , *supra*.

[196] 45 C.F.R. §116.23(1975); *see* note 170 , *supra*.

[197] 45 C.F.R. §116.17(h)(1975); *see* note 174 , *supra*.

[198] 45 C.F.R. §116.26(a)(1975) and 45 C.F.R. §116.26(e)(1) and (3)(1975); see notes 171 and 172, *supra*.

Questions of quality or minimum standards aside, the federal legal framework for application approval clearly indicates that each LEA application must contain some information about each Title I program requirement and must contain the required assurances. Our review of the state legal framework indicated that some SEAs have interpreted the application approval requirement in a manner that appears to be inconsistent with Title I.

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[199] See An Analysis of the Basis for and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965 (September 1977).

b. The State Legal Framework -- The content of different SEA interpretations of application approval and their role in the SEA "determination" that LEA applications "effectively meet" Title I requirements are best analyzed by examining (1) application forms and checklists used by SEAs and (2) LEA assurances that must appear in the application.

The model application form developed by OE in 1968 was not in use in the majority of states included in the study. One SEA continues to use the outdated application form with some minor amendments that reflect some,but not all amendments to Title I statute and regulations. Nine SEAs have developed their own Title I application forms for use by LEAs in their state. This has produced application forms which vary considerably with respect to quality, comprehensiveness and legal sufficiency.

We found that several SEAs used application forms that did not solicit information about a variety of Title I requirements.[200/] For example, one application form used by an SEA contained no information about coordination, concentration, maintenance of comparability, access to information, information dissemination, recordkeeping and reporting, and eligibility and targeting of children. The only data requested concerning supplanting was maintenance of effort data. No information on needs assessment was required in the FY 76 application. However, the SEA had added a needs assessment page to its FY 77 application.

Another SEA uses two types of applications: a school level plan and a district level application. The district level plan and the part of the school level plan submitted to the SEA do not require information about access to information, comparability, coordination, general aid, recordkeeping and reporting, and supplanting. The LEA assurances

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[200/] We sought to determine whether the applications requested any information about the LEA program requirements about which SEAs must make a "determination". The quality of the information solicited by the application form is discussed in An Analysis of the Basis for and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965 (September 1977).

submitted to the SEA cover, among other things, recordkeeping and reporting; SEA access to information, but not the required access to the public, and supplanting. Thus, the SEA has neither information or assurances upon which to base a determination about comparability, coordination, or general aid. In addition, an OE Review Team report has found that some LEA applications submitted to this SEA do not set forth a "discernible, discrete project designed to meet the special educational needs of educationally deprived children".

Other SEA application forms required no information about general aid or comparability or only provided assurances concerning access to information.

In addition to the SEA application forms, we also reviewed, where available, application form checklists and application review sheets used by SEAs when reviewing Title I applications submitted by LEAs. Our general finding was similar to that for application forms, i.e., some application form checklists or application review sheets did not ask questions about all Title I requirements that an SEA must make a "determination" about when approving an application. 201/

With respect to the LEA assurances that must be contained in the application, the finding was that some states have not

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201/ There is no requirement in the statute or regulations that SEAs use an application approval checklist. However, since their use appears to be common, and since SEAs appear to use them as one aid to determining the contents of LEA applications, we reviewed SEA checklists to see if they included items related to each of the program requirements about which SEAs must make a determination.

included some of the required assurances in SEA forms used for this purpose by LEAs. Assurance forms for all the states in the study meet the requirements for assurances concerning the control of funds and property and reporting. The language of these assurances is virtually identical in all SEA assurance forms.

In addition, we found that several assurance forms do not contain the required assurances about supplanting. One SEA assurance form does not contain the required assurances about comparability.

Furthermore, we found that several SEAs have required supplemental assurances from their LEAs. Those which appeared most frequently on SEA assurance forms were assurances concerning parent involvement, construction and coordination. Other assurances required by different SEAs included assurances about access to information, complaints, equipment, and evaluation. Although supplemental assurances of these types are not specifically required by the statute or regulations, we conclude that they are a reasonable exercise of the authority granted SEAs to approve LEA applications.[202]

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[202] We also note that an assurance standing alone does not appear to be sufficient where the Title I legal framework for a specific requirement does not mention an assurance and indicates that the application "shall demonstrate", "must contain", "shall include" or words to that effect.

In reviewing the LEA application forms and assurances used by LEAs, we also found that the forms must be signed by an authorized representative of the LEA. In general, we found little indication on these signature forms of a statement that stressed the legal significance of the application or that reminded potential signers of possible liability for false or fictitious statements. This sort of "reminder" is quite common on many forms used in connection with federal funds or benefits, e.g., income tax forms, applications for federal employment, etc.[203]

c. Policy Analysis and Recommendation -- In general, the federal legal framework imposes a clear understandable requirement upon SEAs that they make a "determination" that each LEA application "effectively meets" each of the program requirements imposed on LEAs by Section

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[203] For example, the standard form used by the Internal Revenue Service for individual income taxes (Form 1040) has the following statement above the space provided for signature: "Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements and to the best of my knowledge and belief, it is true, correct and complete."

141(a) of Title I, the Title I regulations, criteria, and guidelines. OE has attempted to clarify the requirement through regulations; through criteria contained in now outdated program guides; through a now outdated handbook for application approval and other publications; and through the use of OE Review Team reports to point out deficiencies in SEA application approval procedures and to recommend appropriate procedures for approval of LEA applications by the SEA.

However, our review of the state legal framework for application approval indicates that some SEAs included in the study do not require information about certain Title I requirements in the application form or do not use the checklists or review sheets that enable the SEA to make a "determination" or to give "satisfactory assurances" to the Commissioner that all Title I requirements have been complied with by LEAs and the SEA. Thus it appears, on the basis of state procedures, application forms, checklists and assurances made available, that some SEAs may be approving Title I applications that do not conform to the requirements of Title I.[204]

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[204] For a further discussion of compliance problems related to application approval, see pp.164-170 , infra, (B. The Effect of OE Program Reviews and HEW Audits on SEA Performance of the Application Approval Function).

The conclusion we draw from the absence of some of the required assurances is twofold. First, it appears that it may be possible that some SEAs have been approving applications from LEAs that do not conform to the Title I requirements that such assurances must be contained in each LEA application. Second, the assurances provided to OE in the SEA application would appear not to meet the requirements of Title I. It is difficult to understand how an SEA can assure OE that each Title I application approved by the SEA meets the requirements of Title I, if it does not obtain sufficient information from which the SEA can make a "determination" that it "effectively meets" Title I requirements.

The findings suggest that recommendations for amendments to the federal legal framework are appropriate in the areas of application forms, checklists and assurances.

There are several possible solutions to application forms and checklists problems. One is that OE could develop and mandate the use of a uniform application and checklist form. The majority of SEAs did not appear to favor this because of the variety of state related information SEAs require on their application forms. We have concluded that it would not be practical for OE to develop and mandate the use of a single application form or checklist for Title I that could accommodate all the different information required by different SEAs.

Another approach would be for OE to develop a new model application form and checklist or review sheet to help SEAs improve their application forms and review instruments. We recommend that such a form be developed and updated whenever the statute or regulations are amended. However, we do not think that this alone is a satisfactory solution.

Part of the problem lies in the variable clarity with which different LEA program requirements are set forth in the legal framework. While the Title I regulations state, in various parts, that the application shall "demonstrate", "include", "describe", "propose", they do not contain minimum standards (1) for each requirement or criterion about which the SEA must make a "determination" or (2) for the design and content of the application. The issue of minimum standards for each Title I program requirement about which SEAs must make a determination has been addressed in another paper prepared as part of the Legal Standards Project's study.[205]

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[205] An Analysis of the Basis for and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965 (September 1977).

However, because of its important relationship to application approval, it will be addressed here in a general fashion in the following recommendation.

We recommend that the Title I Regulations be amended to:

(1) Include minimum standards developed by OE for (a) each Title I program requirement about which the SEA must make a "determination" and (b) the design and content of the LEA Title I application.

(2) Require OE to develop, disseminate, and update when necessary a model LEA Title I application and checklist to assist SEAs in designing their own applications, checklists or review sheets. 206 /

(3) Require OE to develop, disseminate and update when necessary a monitoring instrument for use by OE in reviewing the legal sufficiency of application forms.

(4) Require OE monitors and/or Program Review Teams to certify in writing that application forms and assurances conform to each Title I requirement.

(5) Include a separate section in the regulations specifying (a) the categories of required assurances and (b) the minimum content of these assurances.

(6) State that SEAs have authority to require additional assurances governing other Title I requirements. However, in no case should an assurance alone be considered a sufficient substitute for more specific information required by the statute or regulations for a Title I requirement.

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206 /The model application and checklist should be included in the Policy Manual which we have recommended that Congress require OE to develop. See pp. 99-101. supra.

(7) Require that each signature page on assurance forms of the SEA or LEA application contain the following existing statutory provision printed on the face of the page or form:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." Title 18 U.S.C. 1001 (June 25, 1948, c. 645, 62 Stat. 749).

(8) Require that each assurance form in the SEA or LEA application form contain the following statement printed on the face of the form:

> "I have read the above assurances and understand their legal significance as part of an agreement between ____________ (name of LEA or SEA) and ____________ (name of SEA or OE) to use the Title I funds requested in this grant application in accordance with these assurances and all other Title I requirements. I further understand that the breach of these assurances may result in audit exceptions and may require the repayment of funds."

The most important of the recommendations above is the first -- minimum standards for each Title I requirement indicating the information which must be included in LEA applications to enable SEA determinations of compliance with the law. The Title I requirement concerning eligibility and targeting of children offers a good example of how this recommendation should be interpreted.

To enable SEAs to determine compliance with the eligibility and targeting requirement, LEA applications must offer the following minimum information:

(1) for each general target group (grade spans or groups such as dropouts, bilingual children, or EMR or other children) to receive Title I services, the number of eligible (educationally deprived) children in the group, indicated by handicaps or subjects in which they were determined to be educationally deprived;

(2) for each general target group, indicate by handicaps or subjects, the number of actual program participants that the program or project will serve;

(3) an explanation of the criteria used to determine the eligible children and to select the actual participants in each general target group (e.g., tests and "cut-off scores").

In practice, this recommendation would mean that more detailed records would have to be kept by LEAs so that monitors could later check the accuracy of the application information, but the standards above are adequate for purposes of application approval determinations [207/] Similarly, detailed

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[207/] We are not recommending that the application become unnecessarily bulky or lengthy. The general recommendation for minimum standards for LEA program requirements is designed to insure that the application contains information of sufficient quality to enable the SEA to determine from a review of the application that Title I requirements have been met.

standards should be formulated for all other Title I requirements.[208]

In addition, we recommend that OE revise, update and print in the Federal Register its handbook for application approval in accordance with the recommendations in this Chapter.

3. The Federal Legal Framework Fails to Provide Adequate Guidance for Certain Procedural Issues Related to Application Approval

a. Introduction -- The study of the federal legal framework revealed that it does not provide adequate guidance in certain procedural areas related to application approval. These areas are (1) the effective date of SEA approval and the types of approval granted by SEAs; (2) SEA procedures for revising or amending project applications or budgets and (3) SEA authority to set deadlines for submission of LEA applications.

In addition, we found that although the federal legal framework contains the requirements for an interrelated system of SEA functions, the procedural interrelationship of application approval with other SEA functions is not fully developed in the federal legal framework. The absence of adequate guidance in these areas has produced divergent state practices and procedures which vary in their quality and comprehensiveness. Set forth below are a discussion and analysis of the federal and state legal frameworks for these areas where adequate guidance has not been provided.

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[208] Recommended standards are offered for each requirement in An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965 (September 1977).

b. The Effective Date of SEA Approval and the Types of Approval Granted by SEAs -- The effective date of SEA approval of a LEA application is important because, as we interpret the Title I regulations in effect during the state interviews, funds may not be obligated or expended by a LEA prior to approval by the SEA. The type of approval granted is important because of its relationship to the effective date of approval.

(1) The Federal Legal Framework -- The Title I legal framework in effect during the state interviews was silent about effective date of SEA approval and the types of approval granted by SEAs. Early Title I regulations did refer to application approval in terms of the funds being available for obligation after "the date on which the application of the (LEA) for a grant . . . was received by the (SEA) in substantially approvable form". (Emphasis added.)[209] However, this provision was not incorporated in the Title I regulations in effect during the state interviews.

(2) The State Legal Framework -- The review and analysis of available state policies and procedures revealed that (1) a variety of SEA policies and procedures govern the effective data of SEA approval of a LEA application and

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[209] 45 C.F.R. §116.46(d)(1966).

(2) different types of approval are granted by different SEAs. The most common, used by over half the SEAs studied, was "substantially approvable." Others used "tentative approval" or "conditional approval."

With respect to the effective data of approval, one SEA did not provide any information about a required approval date. This SEA has had projects operating without approval as late as January or the spring. As of January 1976, ten out of over 200 applications still had not been approved. This SEA has stated in regulations that "projects shall not be implemented prior to receipt of notification of approval from the superintendent of public instruction" and "claims for reimbursement of fiscal expenditures prior to the approved effective date shall not be ignored."

One SEA's FY 77 application approval instructions state that "no project activities may begin prior to the approval date." It also provides that "the project will be stamped in on the date it is received by the Title I office. However, the approval with the signature will be dated only when the project is fully acceptable."

Another SEA uses state guidelines which provide that the funding date of a Title I project is the date the application is received by the SEA in "substantially approvable form" or the beginning date of the project, whichever is later. A related guideline states that "no funds will be advanced or may be expended prior to approval of the project by [the State Board of Education]".

One SEA procedure states that "although an approval date is normally established as of the date the program was received, the (SEA) does not send its official written approval to the LEA until the program has been completely reviewed and approved. The approval letter -- a copy goes to the (SEA) comptroller -- indicates the date of program approval. Expenditures prior to that date may not be charged to Title I, under any circumstances."

One State Title I Director indicated in an interview that the date of approval is the date the approval is signed. But a SEA approval form letter signed by the SEA Director of Federal Programs appears to contradict the State Title I Director. The SEA approval form letter states, in part, that:

> your application for project number_____ under Title I of the Elementary and Secondary Act of 1965 in the amount of $__________ for __________ has been approved by the (SEA), effective _____ 197__, the date it was originally received in this office in substantially approvable form . . . .

With respect to the types of approval, one written SEA policy stated that "substantially approvable" meant that:

> the proposed program is approvable in terms of size, scope and quality; proper consideration has been given to the priorities indicated; there is evidence of parental involvement; and the needs of non-public school children have been met if there are non-public children residing in the eligible attendance area . . . Title I supervisors will review all submissions to determine if the criteria for 'substantially approvable' are met. If not, the documents will be returned to the local school district for completion. Projects will not be 'logged-in' for final review until it is apparent that 'substantially approvable' criteria are met.

Another SEA uses two other types of approval in addition to "substantially approvable". The SEA will grant "tentative approval" of a budget total with the understanding that a particular district's allotment may be reduced if the overall appropriation is reduced. The same SEA will also grant "approval pending clarification" of the LEA's proposed method of paying off prior violations. Two other SEAs also use "conditional approval". One SEA indicated that "conditional approval" meant that payment of funds would be delayed until the condition had been met. The second SEA had not defined the implications of "conditional approval". Apparently neither SEA had defined in writing under what conditions "conditional approval" would be granted.

(3) Policy Analysis and Recommendations -- The new Title I regulations attempt to address the problem of the effective date of an approved application and of the type of approval that may be granted. 45 C.F.R. §116.5(b)(1976) states that

> projects approved pursuant to paragraph (a) of this section shall be considered to be in effect as of the date on which the application was submitted in substantially approvable form. In no event shall such date be earlier than the first day on which the funds being applied for become available for obligation, or the effective date of the state education agency's annual program plan.

We are of the opinion that this provision of the new regulations is inadequate because it fails (1) to define what constitutes "substantially approvable form" and (2) to state that Title I funds may not be obligated or expended prior to the date that the SEA makes a written determination that it has approved the application.

We are also of the opinion that the effective date of the application should not be the date it was submitted in "substantially approvable form". Rather, the effective date should be the date on which the SEA makes a final written "determination" that each Title I program requirement has been met by the application or, as discussed more fully below, has minor defects which can easily be remedied and which the LEA agrees to correct. The effect of this would be to insure that Title I funds could not be obligated or expended until the SEA had determined in writing that the LEA application is in "substantially approvable form."

Accordingly, we recommend that the Title I regulations be amended to provide that:

(1) An application in "substantially approvable form" be defined as an application that (a) conforms to each Title I program requirement set forth in the statute and regulations; or (b) has minor defects which the SEA determines can easily be remedied and the LEA agrees that the defects are minor and is willing to submit written corrections within 30 days. If the LEA does not agree that the defects are minor and is not willing to submit written corrections within 30 days, then the SEA cannot make a determination that the application is in substantially approvable form. 210/

(2) The effective date of an approved application be the date on which the SEA makes its final written determination that the LEA application is in "substantially approvable form".

(3) The SEA must notify the LEA in writing that (a) the SEA has approved the application; (b) the SEA made its final written determination on (date); and (c) Title I funds may not be obligated or expended prior to that date. 211 /

210/ The phrase "minor defects which the SEA determines can easily be remedied" is also ambiguous. However, it preserves SEA discretion and, when linked to the 30 day written correction requirement, helps insure that "minor defects" will be remedied.

211/ This part of the recommendation is similar to a recently proposed amendment to the GEPA regulations governing the effective date of an application, plan, or amendment. 45 C.F.R. §100b.35(c), as proposed, states that "The Commissioner sends the State agency a notice of approval, including notice of effective date, when the application, plan, or amendments is approved." (41 F.R. 56975, December 30, 1976).

(4) Where the SEA uses a preliminary designation of approval that implies less than "substantially approvable", the SEA must (a) define in writing the type of approval, (b) define the circumstances under which it will be granted,(c) clearly state that it does not constitute "substantially approvable", and (d) disseminate such definitions to all LEAs.

(5) The SEA shall establish a deadline by which review of applications will have been completed.

c. SEA Procedures for Revising or Amending Project Applications or Budgets -- Procedures for revising or amending Title I project applications or budgets are important because such amendments frequently occur because of programmatic or fiscal problems with the initial application.

(1) The Federal Legal Framework -- The Title I statute and regulations do not expressly provide guidance or procedures for SEA approval of revised or amended project applications or budgets.

(2) The State Legal Framework -- The review and analysis of state materials revealed that some SEAs have no written policies or procedures governing the revision or amendment of project applications or budgets. Other SEAs have written policies and procedures that describe in varying detail

and quality SEA policies with respect to amendment or revision. One state Title I person interviewed indicated that if the SEA objected to any portion of an application, informal negotiations ensured and differences were worked out. He said that the problems were usually sins of omission. This SEA used a written procedure to describe the approval/revision process.

Another SEA has a written policy that permits budget amendments to be submitted as needed. However, "none are approvable after ending date of project except to reduce the budget." A written policy also states that: "changes in the operation of the project from its original approval must be reflected through budget amendments and these amendments must be approved by the state Title I section before the change is implemented in the project."

Another SEA Title I representative stated that the SEA has no formal amendment process. After applications were reviewed, a letter of approval or delay was sent and a response from the LEA requested. He stated that approximately 50% are approved on the initial reading. Once applications were approved, however, the SEA did have a formal "Program and Budget Revision" procedure and form. A 1973 OE review team report of this SEA found that approximately 700 revisions had been made in 283 applications.

One SEA requires that any budget revision be supported with "a narrative to establish the needs of the proposed changes before the budget amendment may be approved." Other than this statement, the SEA does not appear to have any guidelines concerning the amendment process. It appears that LEAs may submit requests for budget revisions at any time; additionally, if the SEA disapproves of any portions of the application, they are returned to the LEA to be revised and amended. The SEA does have an amendment form to be used by LEAs.

Another SEA had no written policies or procedures governing the amendment or revision process. The state Title I Director stated that: "we write a letter telling the LEAs what they have to do to make applications approvable. Then the districts send back the amendment."

(3) Policy Analysis and Recommendations -- The silence of the federal legal framework and the diverse state policies and procedures in this area suggest that some federal clarification is appropriate. For example, some SEAs had no written policies and procedures in this area. Revisions

or amendments were handled through informal negotiations or telephone conversations. Other written state policies and procedures did not provide an express role for the PAC in the revision or amendment process. We are of the opinion that SEAs would be aided in making more uniform determinations if there existed a written SEA policy or procedure for revising or amending a project application or budget. However, because of the variety of SEA practices in this area, SEA clarification appears more desirable than a uniform procedure mandated by OE. Therefore, we recommend that Title I regulations be amended (1) to include OE developed minimum standards for SEA procedures governing the amendment or revision of applications or budgets, and (2) that SEAs be required to develop and disseminate procedures or policies which at least contain the minimum standards set forth in the regulations.

d. SEA Deadlines for Submission of LEA Applications -- The obvious significance of the SEA deadlines for the submission of LEA applications is that SEAs must have sufficient time to process, review, suggest modifications, make the required "determination", and grant final approval before the project can begin.

(1) The Federal Legal Framework -- The Title I statute and the regulations do not expressly state that states have authority to establish deadlines for the submission of Title I applications from LEAs. However, it can be argued that the express authority granted the SEAs to approve applications contains implied authority to establish submission deadlines. Furthermore, OE has suggested in Program Guide #24 that:

> . . . it would be incumbent upon the State educational agency to see to it that it has sufficient opportunity to assure itself that a project meets the requirements of the Act and Regulations. Deadlines, such as those proposed by some State educational agencies seem to be appropriate for that purpose. 212 /

(2) The State Legal Framework -- The review and analysis of state materials revealed a wide variety of state practices in the area of submission deadlines. Some SEAs set no deadline. Others set different deadlines, e.g., May 1, June 15, July 1. One SEA stated in its instruction book that LEAs should submit applications sixty (60) days prior to the start of the project. However, the interview revealed that this deadline was not mandatory; applications could be submitted only thirty (30) days before the start of the project and would be accepted by the SEA. The SEA official

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212/ ESEA Title I Program Guide #24 (cancelled September 26, 1972).

interviewed indicated that he believed the SEA had authority to set a firm deadline.

(3) Policy Analysis and Recommendation -- The new Title I regulations do not clarify the authority of SEAs to establish deadlines for the submission of Title I applications. Some SEAs have not established deadlines either because of the lack of clear authority or the feeling that deadlines were not necessary.

We conclude that the establishment of deadlines for the submission of LEA applications is a reasonable exercise of SEA authority. Furhtermore, submission deadlines appear to be necessary to give the SEA time to perform the application approval function effectively, and appear to be mutually beneficial to both the SEA and the LEA. The logic of the statement contained in the cancelled Program Guide #24 is consistent with this interpretation. However, it also appears that SEAs desire some flexibility in this area. Therefore, we recommend that the Title I regulations be amended to require that SEAs (1) establish a firm deadline for application submission; and (2) be permitted to extend this deadline in individual cases where warranted by the circumstances.

e. Procedural Interrelationships Between Application Approval and Other SEA Functions --

(1) The Federal Legal Framework -- In theory, application approval should interrelate with several other SEA functions, e.g., monitoring, auditing, enforcement, technical assistance, evaluation and rule making.

With respect to the connection between application approval and monitoring, auditing, and enforcement, the SEA has an opportunity, before approving the application, to review SEA monitoring and audit reports concerning the LEA submitting the application. If these reports indicate that the LEA has not corrected programmatic violations or has not made arrangements to reimburse Title I misexpenditures, then the SEA has an opportunity to require that the LEA do so before the SEA approves the application.

Application approval also relates to enforcement in other ways. First, it lays the groundwork for future enforcement because the application is required to contain certain written assurances from the LEA to the SEA that it will comply with Title I requirements. Thus, the LEA grant application is a legally significant document which, when approved by the SEA, constitutes an agreement between the SEA and the LEA that the LEA will use Title I funds in accordance with Title I requirements. The breach of this agreement can result in the SEA taking enforcement action against the LEA to require compliance with the terms of the agreement and with Title I requirements.

Technical assistance is also related to application approval because the SEA has an opportunity to move beyond the minimum quality required for approval by rendering technical assistance designed to upgrade the quality of LEA applications before they are approved.

Evaluation can also be related to application approval because SEAs can determine whether the results of past LEA evaluations are reflected in the current application. The extent to which this has been done can form the basis for SEA decisions concerning the unmodified continuation of projects that evaluations suggest are not meeting their objectives.[213]

SEA rule making can also be related to application approval because OE has indicated that SEAs can promulgate additional criteria, not inconsistent with Title I, for the approval of LEA applications. Such additional criteria can be designed to emphasize increased program quality rather than just meeting the minimum notions of quality contained in the present LEA program requirements or can emphasize independent state objectives, e.g., a focus on early childhood education.

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[213] We do not mean to suggest that, where appropriate, the results of past LEA evaluations should not be reflected in the program design described in future applications. Rather, the SEA should determine that this has been done.

(2) The State Legal Framework -- We reviewed the state legal framework for application approval to determine if the written materials reflected policies and procedures designed to interrelate application approval with other SEA functions.

In general we found that the state policies and procedures do not always reflect the interrelationship between application approval and other SEA functions. For example, it is not clear from the state policies and procedures whether SEAs, before approving a LEA application, review monitoring and auditing reports concerning the LEA submitting the application. This is not to suggest that SEAs do not at some time review such reports. However, we were seeking to determine if state policies and procedures reflected that such review was part of the application approval process.

With respect to the relationship between application approval and enforcement, it appears, based on a review of state written materials, that some SEAs may possibly be approving applications that do not contain any information about certain Title I requirements that SEAs are required to make a determination about before approving an application.

As for technical assistance rendered during the application approval process, the state written materials generally do not reflect that SEAs are expected to render technical assistance designed to upgrade the quality of LEA programs during the application approval process. Instead, to the extent that the state materials suggest technical assistance during application approval, that technical assistance appears to be directed at the quality of the LEA application in terms of its compliance with the LEA program requirements which address notions of minimum quality.

With respect to the relationship between application approval and evaluation, we found that, in general, the written state materials did not reflect a requirement that, where appropriate, the SEA determine that the program design contained in the pending application reflected the findings of past evaluations. We were informed that the timing of the application approval cycle was such that LEA evaluations of the current year's project were frequently not completed in time for incorporation into the program design contained in the next year's application. However, we merely sought to determine from state materials whether SEAs were required to determine whether the findings of past evaluations, not necessarily the current year's evaluation, were reflected in the program design contained in the pending application.

(3) Policy Analysis and Recommendations -- Although there are several possible procedural interrelationships between application approval and other SEA functions, we have concluded that the federal legal framework does not fully develop these connections. For example, the federal legal framework does not indicate that SEAs must review monitoring and auditing reports concerning the LEA submitting the application and that the SEA must take the results of such reports into account in deciding whether or not to approve the application. Nor do the regulations require that SEAs determine whether the program design contained in the pending application reflects findings of previous evaluations We note, however, that OE has indicated that SEAs should "take necessary steps to determine if any of the following deficiencies exist . . . and to initiate remedial action where indicated."[214]

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[214] ESEA Title I Program Information #313, "Title I Management Problems" (May 6, 1976), 6. Program Information #313 was redesignated as ESEA Title I Inst. A107.1 by ESEA Title I Program Directive Notice A102 (September 26, 1972).

One of the deficiencies described was, "Lack of procedures to ensure improved evaluation . . . including

> techniques for incorporating more promptly the results of such evaluations into the application review process.[215]

With respect to the state legal framework, we have concluded that the written state policies and procedures reflect the federal legal framework's failure to fully develop the connections between application approval and other SEA functions.

Accordingly, we recommend that the Title I regulations governing application approval be amended to require the SEA to develop written procedures to ensure that

> (1) SEAs review monitoring and auditing reports as part of the application approval process and insure that any problems or violations noted in such reports are not reflected in the pending application;
>
> (2) SEAs determine whether the findings of past LEA evaluations are reflected in the pending application.

B. The Effect of OE Program Reviews and HEW Audits on SEA Performance of the Application Approval Function

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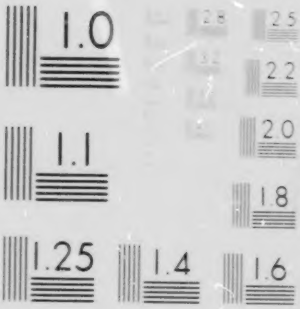
[215] *Id*.

We sought to determine from interviews with SEA officials and from available information whether recent OE program reviews and HEW Audit Agency reports have had any effect on the manner in which SEAs included in the study performed the application approval function. In general, we found that (1) OE Review Team Reports and HEW Audit Agency reports do identify defects in a SEA's performance of the application approval function; (2) some SEAs appear to have changed the manner in which the SEA approves applications; (3) one SEA appears to be reluctant to comply fully with the changes recommended in a series of OE Review Team Reports; and (4) there appears to be a growing awareness that the activities of the Title I Audit Hearing Board indicate the beginnings of a more serious OE enforcement role.

Set forth below are some examples of the apparent effect of OE program reviews and HEW Audit Agency audits.

The FY 1975 program review of one SEA stated that, "The SEA implemented a number of strong recommendations made during last year's program review including one for the development and utilization of a comprehensive checklist for application review and approval." In response to this FY 1975 report, the SEA stated in a letter to OE that, "A comprehensive checklist for application review and approval was developed and used for FY 1975 applications. The checklist has been further refined for continued use in the process with FY 1976 applications."

In another SEA it was evident from reading the program reviews of 1973 and 1974, and comparing those recommendations to the existing application approval procedures in the SEA, that the review teams have had a substantial impact on the SEA's performance of its application approval function. The following is a list of changes that have taken place in the past couple of years: (a) development of an application checklist; (b) deadlines for submission (OE recommended that the deadline be changed from September to May); (c) approval date -- the OE review team recommended that approval deadline be August 1; the actual SEA approval date is now August 30; (d) types of approval -- the OE team recommended that the SEA tighten up its control over review of applications "so as to secure all necessary changes before projects are scheduled to begin." It also recommended that the SEA "drop tentative approval except in rare emergency situations; inform LEAs that Title I funds may not be used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to reimburse expenditures for personnel services rendered prior to date of official, written notification that the state has approved the application or found it to be in substantially approvable form. The FY 1977 application form reflects this policy. The SEA Title I director generally indicated that OE review team comments concerning application approval were a definite factor in the state's decision to change the application form and checklist.

In another state with a two-tiered application approval process, the SEA's performance of the application approval function has been severely criticized by recent OE review team reports. A letter from this SEA to OE highlighted OE's contentions, and the SEA responses, concerning application approval. The letter contained, among other things, an explanation of the use of school level plans. OE was chiefly concerned that SEA was approving applications without prior knowledge of compliance with relevant requirements. A subsequent OE review team report expressed continuing concern about the application approval process. Earlier reports contained information recommending that application forms should be designed to obtain additional information about needs assessment, concentration and program design. The 1975 OE review team report then stated:

> Your agency rejected those recommendations and required even less data and descriptive information in FY 1975 applications. The result of this procedure and other contributing factors has led to further deterioration in quality and compliance . . . .
>
> We have been advised that plans have been made to require LEAs to submit school level plans to your agency for your review by July 1 . . . your approval schedule indicates that the consolidated applications will have been submitted and approved by the State Board of Education before the school level plans are received.

To the latter allegation, the SEA responded, as described earlier, that "the application is not complete and given final approval until school level plans are accepted. June Board action is conditional in order to establish a funding date . . ."

Unlike other states, this SEA did not react quickly and favorably to OE recommendations. However, as a result of negotiations with OE, the SEA has revised part of its policy concerning the submission of school level plans.

With respect to the impact of HEW audits, we found that the apparent effect of one HEW/AA audit on an SEA has been dramatic. The auditors claimed that a significant percentage of violations could have been prevented if the SEA had properly reviewed the LEA's applications. The SEA, with the support of a newly elected state superintendent, recognized its responsibilities and developed policies and procedures to correct shortcomings highlighted by the audit.

Another SEA indicated that it had made revisions in its application approval process following an HEW/AA audit. Three examples of the audit findings and SEA responses contained in an SEA letter to OE follow.

> Statement (HEW/AA): "The SEA approved activities or provided services which were not identified with the special needs of educationally deprived children."
>
> Response (SEA): "The application format now requires all districts to provide specific needs assessment information as a basis for any services required under Title I. See Position Paper on Needs Assessment for ESEA Title I programs and the ESEA Title I Application (Pages 11-14), both of which are enclosed."
>
> Statement (HEW/AA): "The SEA's analysis of information within LEA project applications was inadequate because non-target schools were served. The need for tighter control over LEA operations is indicated."
>
> Response (SEA): "The review process now includes specific checking of all calculations establishing eligible buildings. See attached [Administrative Review Checklist] and the instructions to districts contained in the attached SEA Guidelines and Instructions, Pages 7 and 8 and Appendix B."

> Statement (HEW/AA): "The SEA should develop and implement procedures for more in-depth review and analysis of project proposals. These procedures would, as a minimum, provide for additional emphasis on those projects that appear to be designed to meet the needs of a school or the student body at large or entire classes in a school."
>
> Response (SEA): "The [SEA] has instituted a management system to insure compliance with all existing regulations and guidelines through annual conferences, strict reviewing procedures, overall responsibility for approval to one person . . . and a monitoring and on-site evaluating system in which 90% of the money expended for Title I will be monitored and/or evaluated each year. See attached on-site evaluation instrument, evaluation of annual program conference and procedures for reviewers regarding scheduling of on-site evaluations."

Our general conclusion is that OE Review Team Reports and HEW Audit Agency reports appear to be having some positive and beneficial effects in some states. However, because of our finding that some state interpretations of the application approval requirement do not appear to enable a SEA to make a "determination" that a LEA application "effectively meets" each Title I requirement, we have concluded that OE and the HEW Audit Agency should strengthen their efforts to insure that applications are properly approved; projects are implemented in accordance with approved applcations; and Title I funds are expended properly.

CHAPTER 2

SEA RULE MAKING AND INTERPRETATION

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CHAPTER 2
SEA RULE MAKING AND INTERPRETATION

I. Introduction

This introduction to the rule making and interpretation functions performed by SEAs contains (1) an overview of the federal legal framework for SEA rule making and interpretation; (2) a discussion of the organization of this chapter; and (3) the major issues, findings, conclusions, and recommendations contained in the chapter.

A. Overview of Federal Legal Framework

The overview of the federal legal framework for SEA rule making and interpretation includes (1) the purpose and importance of the functions, and (2) the federal legal framework for SEA rule making and interpretation.

1. The Purpose and Importance of the Functions

Rule making and interpretation are important SEA functions because SEAs use them to direct and guide LEA use of Title I funds.

Rule making has been generally defined as the "issuance of regulations or the making of determinations which are addressed to indicated, but unnamed and unspecified persons or situations"[216] and as an "agency process for formulating, amending or repealing a rule."[217] What constitutes a "rule" is somewhat less clear. The Federal Administrative Procedure Act defines a rule in part as

> . . . the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency . . .[218]

The 1970 version of the Uniform Law Commissioners' Revised Model State Administrative Procedure Act defines a rule in part as

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency . . .[219]

The General Education Provisions Act defines a "regulation" as "any rules, regulations, guidelines, interpretations, orders or requirements of general applicability prescribed by the Commissioner."[220]

216/ Fuchs, Procedure in Administrative Rule Making, 52 Har. L. Rev. 259, 265 (1938).

217/ 5 U.S.C. §551(5).

218/ 5 U.S.C. §551(4).

219/ Section I.(7) of the Uniform Law Commissioners' Revised Model State Administrative Procedure Act, 1970 Version.

220/ Section 531(a)(1) of GEPA (20 U.S.C. 1232(a)(1)).

For purposes of this paper, the term "rule" has been defined broadly to include SEA rules, regulations, guidelines, policies, and written procedures. Thus, as used in this paper, the term "rule" is not strictly limited to regulations published in procedural compliance with State Administrative Procedure Acts. Similarly "rule making" has been defined as the process by which SEA rules, regulations, guidelines, policies and procedures are formulated, issued, and amended or repealed.

The term "interpretation" as used in this paper includes SEA clarification of federal or state requirements, including both formal written or informal verbal clarifications rendered to individual LEAs. When a particular interpretation rendered to an individual LEA is widely disseminated by the SEA to other LEAs, it will be considered a guideline.

Rule making and interpretation are also important because the manner in which the SEA performs these functions can determine whether and how an SEA exercises discretion to impose additional requirements or criteria on LEAs. In addition, rule making and interpretation can be the means through which SEAs place restrictions on LEAs in specific areas, e.g., program development and reporting and recordkeeping.

2. The Federal Legal Framework

The Title I regulations issued by OE recognize certain rule making functions SEAs perform under Title I, i.e., members of parent advisory councils must be furnished copies of certain documents, including "State Title I regulations and Guidelines" (Emphasis added.)[221]

This certainly implies that SEAs are authorized to issue state regulations and guidelines for Title I. The major areas in which SEAs are authorized by regulation, either expressly or by implication, to promulgate program requirements which LEAs must meet include parent involvement,[222] reporting to the SEA,[223] program and fiscal recordkeeping,[224] and program development.[225]

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[221] 45 C.F.R. §116.17(1)(2)(ii)(1975). The same provision now appears in 45 C.F.R. §116a.25(g)(i)(1976).

[222] 45 C.F.R. §116.17(o)(3)(1975). This provision now appears in 45 C.F.R. §116a.25(h)(1976).

[223] 45 C.F.R. §116.23(1975). See 45 C.F.R. §116.46(1976).

[224] Id.

The Title I regulations pertaining to parent participation include a provision which generally states that the SEA, at its discretion, may establish additional rules and procedures, not inconsistent with any federal rule or procedure, "as may be reasonably necessary to ensure the involvement of parents and the proper organization and functioning of parent councils."[226]

With respect to the LEA reporting requirements, the SEA requires such reports "in such form and containing such information, as may reasonably be necessary to enable the State educational agency to perform its duties under Title I of the Act . . ."[227] and LEAs must keep "such program and fiscal records . . . as the State educational agency may find necessary to assure the correctness and verification of such reports and the expenditure" of Title I funds."[228] These provisions indicate that the SEA may regulate the nature of the reports submitted to it by LEAs and the type of program and fiscal records that LEAs must keep to assure the correctness and verification of LEA reports and LEA expenditures of Title I funds.

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[225] See, e.g., 45 C.F.R. §116.17(c), §116.18(b) and (e) and §116.24(1975). Comparable provisions appear in the new regulations at 45 C.F.R. §116a.19(b); §116a.20(a) §116a.22; and §116.41(1976)).

[226] 45 C.F.R. §116.17(o)(3)(1975). See 45 C.F.R. §116a.25(h) (1976).

[227] 45 C.F.R. §116.23(1975). See 45 C.F.R. §116.46(1976).

In accordance with its application approval responsibility, the Title I regulations require that the SEA determine, among other things, whether the projects described in the Title I application are of

> sufficient size, scope, and quality as to give reasonable promise of substantial progress toward meeting the special educational needs of educationally deprived children . . . [229]

In addition, the SEA must determine that such projects have been developed in accordance with a needs assessment; project objectives have been established; the project design is consistent with the objectives; funds are sufficiently concentrated; there is adequate coordination; and adequate procedures and techniques for an annual evaluation of the effectiveness of the project are described in the application.

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[228] 45 C.F.R. §116.23(1975).

[229] 45 C.F.R. §116.18(a)(1975). See 45 C.F.R. §116a.22(b)(1976).

Given the express authority of the SEAs to make determinations about whether the content of a LEA application meets Title I requirements and the express reference in the federal regulations to "State Title I regulations and guidelines,"[230] it is reasonable to conclude that the SEA has implied authority to promulgate State Title I regulations and guidelines which are not inconsistent with Title I requirements and which govern program requirements about which the SEA is required by statute to make a "determination."[231]

The interpretation function, i.e., that SEAs explain to LEAs the meaning and the scope of federal statutes and regulations, is not expressly mentioned in either the Title I or GEPA statutes or regulations. However, it is clear from the legislative history of Title I that SEAs must render interpretations as part of the application approval function. This aspect of interpretation is referred to in the Senate Committee Report accompanying the Education Amendments of 1969. This report indicated that the SEA should render opinions regarding the legality and acceptability of specific programs and projects, i.e., "it is the duty of the SEA to inform local agencies about weaknesses in their applications."[232]

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[230] 45 C.F.R. §116.17(o)(2)(ii)(1975). See 45 C.F.R. §116a.25(g)(1)(1976).

[231] §141(a) of Title I (20 U.S.C. 241e(a)).

It also seems apparent that normal program operations would require SEAs to render interpretations of statutes and regulations during such activities as monitoring, technical assistance, auditing, or enforcement proceedings.

With respect to the informal federal legal framework, former OE Program Guides have indicated that SEAs have authority to establish standards for Title I proposals submitted by LEAs. For example, Program Guide #24, in discussing the nature and scope of state authority, states that

> . . . the State Educational Agency can establish criteria and disseminate them for the guidance of [LEAs] . . . the State agency may state that a particular practice or policy is 'desirable'; it may also advise [LEAs] of the specific or general criteria on which project proposals involving such a practice or policy will be evaluated, and it may apply such criteria in the approval of projects instead of letting such agencies decide for themselves. 233/

232/ S. Rep. No. 91-634 91st Cong. 1st Sess. U.S. Code Cong. and Adm. News, (1970), 2775.

233/ ESEA Title I Program Guide #24, 8.1 (cancelled Sept. 26, 1972).

Program Guide #36 also suggested that the SEA could establish additional criteria for LEA proposals. It states that the SEA "will review each proposed project and determine whether it meets the Title I size, scope, and quality requirements in accordance with the foregoing criteria and such other criteria as the [SEA] may apply."[234] (Emphasis added.)

OE has also suggested in Title I ESEA: How It Works that SEAs do have authority to issue rules and regulations for Title I. In defining the term "regulations", the publication states, "States may also issue rules and procedures for Title I, as long as they do not conflict with Federal regulations and law."[235]

The Commissioner has also implied, in a report on SEA administration attached to his letter to a chief state school officer, that SEAs can and should develop state regulations and guidelines. This document, which was not, to our knowledge, disseminated to other SEAs, criticized the SEA for relying exclusively on federal regulations and

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234/ ESEA Title I Program Guide #36 (April 14, 1967) was superseded by Program Guide #44 (March 18, 1968).

235/ Title I ESEA: How It Works, A Guide for Parents and Parent Advisory Councils, DHEW Publication No. (OE) 73-07104, 66 (1973) guidelines to administer the Title I program. The OE report stated that

> The state has made *no attempt to develop State Regulations or guidelines* as a means of providing technical assistance to [LEA] officials regarding educational needs, problems, and issues relevant to the State . . . . There was no evidence that guidance or direction in the following critical areas has been developed for [LEAs]: (1) Identification of eligible attendance areas (2) Identification of eligible students (3) Program design (4) Proper use and concentration of funds and personnel (5) Parental involvement (6) Program evaluation (performance criteria) (7) Effects of school desegregation on Title I services (8) Services to non public children (9) Concentration of funds and services." [Emphasis added.]

Other OE correspondence has also given policy guidance about SEA authority to promulgate additional rules and guidelines not inconsistent with Title I. For example, one SEA developed state guidelines for the reallocation of Title I funds. The guidelines contained criteria which would have governed the amount of funds allocated to LEAs and which were not consistent with the Commissioner's criteria for reallocation. An OE letter to the SEA indicated that although OE had supported the establishment of additional

> criteria on the part of a [SEA] which will contribute to assuring that Title I projects have sufficient size, scope, and quality to give reasonable promise of meeting the special educational needs of educationally deprived children, that support cannot be legally extended to criteria which will determine the allocation to [LEAs].

In another letter to a Congressperson which concerned, among other things, SEA authority to establish and apply standards for application approval and concentration of Title I funds, OE stated that

> . . . the prerogative of the state to set such requirements is upheld by the Title I regulations which require the [SEA] to determine whether an application has 'sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting the special educational needs of educationally deprived children'. *The SEA therefore has the authority to establish general standards for proposals* and the responsibility to inform applicants that such standards will be applied. [Emphasis added.]

In one state, a LEA wrote to OE and asked about the compatibility of SEA guidelines for selection of target areas with the Title I regulations. OE replied that Title I prohibited federal control over the administration of a school system within a state and that, "*Accordingly the Office of Education does not set limits on State guidelines, other* than to see that Federal law is not contravened." (Emphasis added.)

In another state, the SEA established a written policy that project applications would be disapproved if they included proposed expenditures for outside consultants, other than evaluation consultants, whose services would duplicate services provided by LEA staff paid with Title I funds. In response to an information copy of the policy, OE stated that, "We agree that such a ruling demonstrates appropriate state stewardship of Title I funds."

B. Organization of the Chapter

Part I of this Chapter has set forth an overview of the federal legal framework for SEA rule making and interpretation. Part II will analyze the clarity and scope of the federal and state legal frameworks for SEA rule making and interpretation. Recommendations for amendments to the Title I regulations are also contained in Part II.

C. Major Issues, Findings, Conclusions, and Recommendations

The Legal Standards Project has recommended, in part, that the Title I regulations be amended to authorize SEAs to promulgate additional criteria, not inconsistent with Title I, for SEA approval of LEA applications; to require SEAs to disseminate and apply any such additional criteria; and to require OE to review and approve any such additional criteria in writing during OE monitoring visits.

We have also recommended that the clarification of authority to promulgate additional criteria include a definition of the scope of any such criteria, e.g., the extent to which restrictive criteria may be imposed for reasons of educational policy or for other reasons. These and related recommendations are set forth in detail in Part II of this Chapter. An overview of the major issues and findings that led to the formulation of these recommendations is presented below.

In general, we found that the Title I regulations, except for a provision governing parent advisory councils, do not contain express authority for SEA rule making, including the promulgation of additional criteria, not inconsistent with Title I, for SEA approval of LEA applications. Upon further analysis of the regulations, we concluded, in part, that implied authority for SEAs to promulgate additional criteria for application approval does exist. We found that OE has repeatedly supported this interpretation in OE correspondence about SEA rule making and in former Program Guides #24 and #36.

However, we also found that while some states have actively used this implied authority, others have been reluctant to do so because the authority is not expressly stated in the regulations and because of historical SEA deference to LEAs in these states. These findings and conclusions led to the above recommendation for express authority for SEAs to promulgate additional criteria, not inconsistent with Title I, for approval of LEA applications.

With respect to the scope of SEA authority to promulgate additional criteria or restrictive policies, we found that some SEAs have adopted additional criteria or have implemented restrictive policies. Where this has occurred, it has usually been (a) as a narrow SEA interpretation of a Title I requirement that appears to be ambiguous; (b) as protection against future audit exceptions; or (c) as a matter of educational policy, e.g., a SEA decision to support only K-3 projects.

We are of the opinion that SEAs may impose certain restrictive criteria, but that OE should provide guidance through regulations about the scope of such SEA authority. To minimize the chance that restrictive policies or criteria are based upon narrow SEA interpretations of ambiguous Title I requirements, we have repeated our recommendation that OE be required to establish minimum standards for each Title I program requirement [236] and that OE be required to develop a policy manual including, among other things, summaries of OE interpretations given to SEAs.[237]

To reduce the risk that restrictive SEA criteria or policies will be based on a concern with future audit exceptions, we have recommended that OE, if it has not already done so by previous interpretation, clarify and publish all of the various legal program design options and clarify the circumstances under which specific components may be included.

And finally, to clarify the extent to which SEAs may base restrictive criteria or policies on educational policy, we have recommended that OE clarify SEA authority in this area and publish examples of acceptable restrictive policies or criteria, e.g., a SEA requirement that Title I funds be focused on a particular grade span.

236/ Recommended standards for each LEA program requirement are contained in An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirement Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965. (September 1977).

237/ *See* pp. 99-101, *supra*.

II. The Clarity and Scope of the Rule Making and Interpretation Functions

This section of the study reviews and analyzes the related but analytically distinguishable issues of the clarity and scope of the rule making and interpretation functions.

A. The Clarity of the Rule Making and Interpretation Functions

1. Introduction

The purpose of this section is to review and analyze the clarity of the federal and state legal frameworks for SEA rule making and interpretation as they relate to the general Title I rule making and interpretation authority of SEAs. The issue of the scope of SEA Title I rule making and interpretation is the subject of the following section.

2. The Federal Legal Framework

The formal federal legal framework is somewhat unclear about the authority of SEAs to issue State Title I rules and regulations that are not inconsistent with Title I. With the exception of the provision for additional regulations for parent advisory councils,[238] SEA authority to issue State Title I rules and regulations is implied rather than expressly stated in the Act or regulations. Elements of the informal legal framework indicate that OE has repeatedly indicated that SEAs have such authority. However, except for the provision in the parent advisory regulations, neither the Act nor the regulations has expressly stated that SEAs may promulgate State Title I rules and regulations that are not inconsistent with Title I.

As for interpretation, neither the Act nor the regulations contains any express requirement that SEAs must clarify federal or state requirements governing Title I. However, normal program operations make interpretations necessary.

3. The State Legal Framework

The review of state materials made available clearly indicates that SEAs have issued a wide variety of state Title I policies and procedures that qualify as "rules" as that term has been broadly defined in this paper. These have appeared in a variety of sources and in various forms, e.g., application instructions, policy statements, procedural requirements, and handbooks or other publications. However, our general finding was that these do not always constitute a comprehensive regulatory scheme, i.e., some SEAs do not have written policies and procedures in important areas. Furthermore, the state materials indicated that only two states have issued formal "regulations" in accordance with state administrative procedure acts.

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[238] 45 C.F.R. §116.17(o)(3)(1975). See 45 C.F.R. §116a. 25(g)(1)(1976).

It is also clear from the review of state materials and interviews with state Title I personnel that SEAs have developed or rendered interpretations of Title I requirements, but that most SEAs lack a systematic method for doing so.

With respect to rule making, one SEA is of the opinion that it has authority to develop substantive policies of general applicability, but it does not think of this as formal rule making or regulation writing. The SEA's written substantive policies are generally set forth in either the SEA's Title I guidelines, application instructions, or monitoring instrument which is distributed to all LEAs. The SEA Title I guidelines were reviewed and approved in writing by OE.

Another SEA feels that it has authority, based on its application approval authority, to issue substantive rules. However the SEA has not exercised its authority in this area with respect to regulations or guidelines because of the tradition of local autonomy in education. The SEA policy as expressed by the State Title I Director, is to "let districts do what they want as long as they are consistent with the federal regulations -- [the] nature of the state is not to be directive."

One SEA Title I official indicated that the SEA was at an historical disadvantage because of the traditional autonomy of LEAs. He felt that federal funds had altered the balance of power by giving the SEA more power, but that the SEA remained weak when it came to promulgating regulations concerning LEAs. He stated that:

> a lot of rules are not in writing. They [SEA] know they can do it [promulgate rules] with respect to Title I, but their reluctance has to do with historical reasons . . . one good offshoot of [a Title I lawsuit alleging in part, improper SEA approval of LEA applications] is to strengthen the SEA role in this area.

Another SEA feels that it has authority to issue substantive rules, but considers its Title I manual and SEA guidelines to be the equivalent of substantive rules. According to one State Title I official, any changes that are made in the guidelines in this manual must be approved by the State Board of Education and by the State Assistant Commissioner for Education. The SEA feels that its policy manual has the force of law because it is based on federal regulations and because the state can withhold funds if an LEA violates the SEA's Title I guidelines.

One SEA has used the state administrative code to promulgate regulations both where it has express authority (parent advisory council) and where it feels it has implied authority, e.g., administrative costs, in-service training, a state advisory committee. OE was sent a copy of the draft rules, but as one SEA Title I official expressed it, the SEA "didn't get any suggestion that we were on the right track." This SEA is also in the process of compiling a Title I manual which will detail its policies in each of the major program areas.

The manner in which SEAs interpret Title I requirements is also revealing. In general, the study found that many SEA interpretations were oral and that a written interpretation given to one LEA was not always shared with other LEAs. For example, in one SEA Title I area, supervisors generally respond to individual requests for interpretations over the phone. There is no express procedure for reproducing or disseminating interpretations made by one area supervisor to other LEAs. There is no manual where the different interpretations of area supervisors are collected. However, some written interpretations are produced by the SEA. These are most frequently contained in SEA monitoring reports or in correspondence concerning SEA audit exceptions.

Another SEA has kept written interpretations to a minimum. This SEA has developed a limited number of position papers concerning some Title I requirements. However, it appears that, in areas not covered by state position papers, many interpretations are given orally on an ad hoc basis by SEA staff.

One SEA indicated that it had developed an internal system for disseminating written interpretations to SEA area supervisors for use with the SEA monitoring instrument. However, when asked how the SEA handled requests for clarifications from LEAs, a state Title I official stated that: "The SEA has learned not to put anything in writing," but rather to respond over the phone or during monitoring visits.

Another SEA uses a notebook system for LEAs so that all LEAs receive general SEA memoranda, interpretations, and federal regulations. The State Title I director indicated that the staff was increasing the use of written letters of interpretation including a letter following requests for clarification via phone.

Different SEAs had different experiences with OE support for SEA interpretations. One SEA that regularly seeks guidance from an OE area desk person found the assistance helpful, but the OE desk person very rarely put anything in writing about the SEA interpretations. Another SEA Title I official commented that, "most of the time OE won't say anything." One State Title I Director has on more than one occasion requested, both orally and in writing, OE confirmation of SEA interpretations. OE officials have not responded in writing to the requests. Another SEA Title I official indicated that the SEA is confident of its own interpretations and doesn't need to seek OE assistance for its interpretations.

4. Policy Analysis and Recommendations

The new regulations do not clarify the rule making and interpretation functions. However, the general lack of express authority in the Title I regulations for SEA rule making has not prevented SEAs from issuing a variety of state Title I policies and procedures. As previously mentioned, these do not always constitute a comprehensive regulatory framework because some states do not have state Title I policies and procedures for important areas. In general, SEAs did not think of these policies and procedures as formal "rules and regulations". However, some SEAs expressed the opinion that their policies and procedures had the full force and effect of regulations.

In general, SEAs were not very precise about the authority to issue state Title I "rules" other than the limited express authority contained in regulations governing parent advisory councils. Some SEAs mentioned implied authority derived from their application approval authority. Others provided no information about authority to promulgate rules.

OE has indicated repeatedly in correspondence that SEAs have authority to issue State Title I guidelines and policies that are not inconsistent with Title I. In addition, former OE Program Guides (#24 and #36) have indicated that SEAs could develop additional criteria for application approval and could require LEAs to meet those criteria. Furthermore, the OE publication, Title I ESEA: How It Works, states that, "States may also issue rules and procedures for Title I, as long as they do not conflict with Federal Regulations and law."[239]

We have attempted to analyze why the Title I regulations refer only indirectly to "State Title I rules and regulations" and why the regulations do not expressly state that SEAs may promulgate State Title I rules, guidelines, policies, etc. that are not inconsistent with Title I. Part of the reason may be that OE is reluctant to give the appearance of vesting independent rule making authority in SEAs that must also function under state law.

The Title I regulations define a SEA as "the officer or agency primarily responsible for the State supervision of

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239/ *See* note 235, *supra*.

public elementary and secondary schools."[240] It may be that, in some states, the SEA, as defined in Title I regulations, does not have authority under state law to issue formal regulations in accordance with a state administrative procedures act. Or it may be that, in some states, the SEA is not authorized by the state education code to issue formal regulations. For example, under state law in some states, that authority may be vested in a state board of education rather than in the SEA as defined by Title I regulations.

We do not, however, interpret "rules" or "regulations" so narrowly as to mean formal rules published in a state administrative regulations compilation analagous to the *Code of Federal Regulations* or the *Federal Register*. As we have used the term and as OE has interpreted it in Title I correspondence and publications, it extends to state Title I guidelines, policies and procedures, application criteria, etc., that are not inconsistent with Title I.

There is ample evidence in the state materials and OE correspondence made available to the Legal Standards Project to indicate that the lack of clarity in the Title I regulations has not prevented some SEAs from active "rule making" in the broadest sense of the term. However, it appears that in other states, the lack of clarity in the regulations has inhibited an active SEA role because of the historical relationship between the SEA and LEAs in these states.

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[240] 45 C.F.R. §116.1 (aa)(1975).

The Legal Standards Project has concluded that SEA "rule making" in its broadest sense has an important relationship to an active SEA role in insuring high quality Title I programs and projects. This conclusion is not based upon any empirical findings, but upon the observation that SEA "rule making" is a means of developing additional state Title I criteria that are designed to emphasize quality in Title I applications and are not inconsistent with Title I.

It seems clear that the express authority granted SEAs to review and approve LEA applications carries with it implied authority to issue state Title I "rules" governing LEA applications and LEA program requirements. A number of SEAs appear certain of this. Others are less clear about SEA authority to issue Title I rules. Federal clarification in the area of SEA "rule making" appears to be necessary.

Clarification also appears to be necessary for the interpretation function. In general, SEAs appear to be spending more time on interpretation than would be necessary if OE had a regular system for disseminating to all SEAs OE interpretations given to a particular SEA.

Although some SEAs appeared to be critical of the lack of dissemination of OE interpretations, most SEAs basically followed a similar policy of not disseminating SEA interpretations to LEAs. The widespread reliance on giving interpretations over the telephone may, depending on the size of the SEA staff and the number of LEAs in the state, mean that different LEAs are receiving different interpretations from different SEA Title I staff. The likelihood of this occurring appears to be much greater in those SEAs that have few written interpretations and that do not disseminate existing interpretations to LEAs.

The general lack of express authority for rule making and the silence of the federal legal framework about SEA interpretation suggest that state administration of Title I would be strengthened if the federal legal framework addressed these functions more clearly. Since the scope of SEA rule making is discussed in the following section, we present here only a general recommendation about SEA rule making. In fashioning this recommendation, we have focused on the SEA's ability to promulgate additional criteria for SEA approval of LEA applications; considered OE support as expressed in OE correspondence and former Program Guides for additional criteria; and avoided the use of the terms "rules" or "regulations" because of possible conflict with state law.

We recommend that the Title I regulations governing SEA approval of LEA applications be amended (1) to authorize the SEA to promulgate additional criteria, not inconsistent with Title I, unless expressly restricted by federal regulation from promulgating additional criteria for a particular LEA program requirement; (2) to require SEAs to disseminate any such criteria to LEAs for their guidance; and (3) to authorize SEAs to apply any such criteria to the approval of LEA applications rather than letting LEAs decide for themselves; and (4) to require OE, as part of its monitoring responsibilities, to review any such additional criteria and to render a written opinion as to their consistency with Title I requirements

As for SEA interpretation, we recommend that the Title I regulations be amended to (1) include a separate section for interpretations[241] and (2) require SEAs develop written procedures for disseminating, on a continuous basis, to all LEAs any SEA letters or memoranda containing SEA interpretations or clarifications of Title I requirements or SEA policies or procedures related to Title I.

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[241] See pp. 97-98, supra, for further discussion of this recommendation.

B. The Scope of SEA Rule Making and Interpretation

1. Introduction

The purpose of this section is to review and analyze the federal and state legal frameworks for rule making and interpretation as they relate to the authority of SEAs (a) to issue rules (or criteria) or interpretations that clarify, but don't restrict LEAs or (b) to issue rules (or criteria) or interpretations that restrict LEAs by going beyond the requirements of Title I.

2. The Federal Legal Framework

The federal legal framework does not directly address the scope of SEA rule making and interpretation. Thus, the federal legal framework is silent about state rules or policies which might (a) legitimately encourage maximum flexibility by clarifying but not restricting LEA choices or (b) overly restrict program design options as a result of conscious policy choices or misinterpretations of the federal framework.

3. The State Legal Framework

a. Introduction -- We found significant variation within the scope and comprehensiveness of SEA rules and interpretations of Title I. In many of the states not all requirements and/or all aspects of a particular requirement were interpreted or covered by an SEA rule or policy. Thus, for example, in one state which developed comprehensive materials explaining the intra-school supplanting aspect of the general supplanting provisions and developed comprehensive policies respecting parent involvement, no comprehensive policies were developed respecting the "ordinarily provided" concept,[242] the targeting of children, needs assessment and the concentration requirements. A second state developed comprehensive materials with respect to targeting children, needs assessment and evaluation, but very little with respect to the other requirements.

The quality of state rules, policies, and interpretations of Title I requirements also varied considerably. Some were sufficiently clear to guide LEAs in determining whether specific practices were legal. Others were a mere reiteration of federal materials. We found a range of SEA approaches concerning SEA rule making and interpretation of particular requirements. The range varied from doing very little, to reprinting or paraphrasing broad federal policies; from developing state guidelines explaining how the broad policy would apply in certain

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242/ 45 C.F.R. §116.17(h)(1975). The new regulations have deleted the phrase "ordinarily provided" and replaced it with an "equitably provided" provision. See 45 C.F.R. §116a.22(b)(10)(1976).

factual circumstances, to the development by the SEA of legal models.

We have concluded that one or more of three reasons generally motivates a state to develop a comprehensive policy for a Title I requirement. First, former SEA practices may have been criticized by OE Review Team Reports or HEWAA Reports. Second, a number of LEAs may have demanded clarification concerning a specific issue, e.g., the use of teacher aides. Third, the SEA may have chosen to promote particular educational policies.

We found that the first two reasons generally controlled the development of SEA policies or interpretations governing such requirements as targeting of children, supplanting, general aid, and comparability. Several states which developed a comprehensive policy concerning supplanting without much prodding are exceptions to this pattern. The third rationale generally explained the development of policies with respect to such requirements as parent involvement, needs assessment, program design, and evaluation.

The rationale for the above division is apparent. SEAs feel more comfortable assuming a more active role with respect to requirements which are traditionally thought of as being within the realm of educators' expertise. SEAs appear less likely to take the initiative with respect to requirements that protect the categorical nature of the Title I program.

We found that these SEAs which developed comprehensive written policies spent an inordinate amount of time doing so because of the need to "discover" the meaning and scope of the various standards and operative definitions. This, of course, is a major deterrent to the development of comprehensive policies by SEAs. This time could be better spent on providing technical assistance respecting the actual educational strategies proposed and implemented by the LEAs.

b. State Policies Which Clarify But Do Not Restrict -- A number of states have developed policies which clarify, but do not overly restrict LEAs. Among these are state prepared handbooks for parental participation, legal models for "in-class" or "pull-out" programs, and policies that use examples to clarify the use of Title I aides. Examples of each of these follow.

o State Prepared Handbooks -- Several states clarify and explain particular requirements by writing handbooks. For example, one state studied has written a number of handbooks clarifying the parent involvement requirement. One such handbook entitled, A Parent's Introduction to Title I, ESEA: A Handbook for Parent Advisory Councils provides parents with a general description of the LEA program requirements and then in a series of ten study units explains the federal requirements, the state requirements, and recommended procedures covering, for example, PAC membership and organization, monitoring, and program design.

Another handbook is entitled, A Training Manual For Parent Councils. This document was prepared by the SEA to assist LEAs in meeting the state and federal requirement that PACs receive training. The manual contains detailed recommendations concerning policies, practices and procedures.

o Legal Models Developed by SEAs -- Several SEAs included in the ten state survey have developed legal models to guide LEAs in the design of their programs. One SEA is developing several model legal program designs for "in-class" and "pull-out" programs. The pull-out models fall into three general categories. The first category describes the situation in which the regular classroom teacher retains responsibility for the education of the targeted children with a continuous exchange of information between the regular teacher and the Title I paid teacher. The second category is one variation of the so-called "double-dose" method in which the pull-out program reinforces instruction received in the regular class, and the child is pulled-out of the regular classroom only during non-instructional periods. The final category has been called the excess costs model under which the eligible child may receive all instruction in a particular subject in the Title I program so long as the same level of state and local monies which would have been spent on the child are contributed by the district to support the pull-out program, with Title I funds used for the excess costs of the program.

This state has also developed legal models for in-class programs. The SEA application form for the 1976-1977 school year explains:

> Participants are served in the regular classroom setting by certified, non-certified persons or by tutors during reading, mathematics or language arts periods.

A second description of this model also was explained in a letter to an LEA Superintendent:

> Classroom aides -- aides are trained to assist eligible Title I students under the direction of the regular classroom teacher. Assistance is provided in reading, mathematics or language arts only. This model applies supplemental resources for the instruction of Title I students.

In a second state, the SEA issued a policy statement explaining the standards for determining the legality of a pull-out program. These models are described below.

Under the first pull-out model, the classroom teacher, paid from state and local funds, retains ultimate responsibility for the education program of each participant in the Title I program. "The Title I teacher is available solely to assist the regular teacher in working with educationally deprived children who meet the district's criteria for participation in the Title I program." Thus, the SEA explained that "the term 'pull-out' program is really a misnomer for describing this type of a program. The children remain in the regular classroom under the supervision and responsibility of the regular classroom teacher in every sense except the child's physical location for one or two periods a day."

To assure that the classroom teacher retains responsibility under this model, the SEA maintains that "in order to have the necessary planning, implementation, and evaluation of a child's progress between teachers, the child must come from the English class (if reading is being remediated) and the necessary coordination must be between the child's English teacher and the Title I lab-teacher."

To assure the necessary coordination, the SEA has, on various occasions required LEAs to establish written procedures describing the coordination process as part of the project application. One such LEA procedure is set forth below.

PROCEDURE OF COORDINATION BETWEEN REGULAR CLASSROOM TEACHERS AND COMPENSATORY EDUCATION TEACHERS [243]

For the remainder of this year the major method of coordination will consist of two related forms: structured meetings or conferences and informal meetings. The function of each is outlined below.

243/ Readers interested in the relationship between Title I and state compensatory education programs should consult another report prepared by the Legal Standards Project, An Analysis of the Relationships Between Title I and Selected State Compensatory Education Programs. (September 1977

1. Structured Meetings

   Regular classroom teachers, who are paid from local funds, will meet one day of every fourth week with the compensatory education teachers, who are paid from Title I funds.

   At this meeting -- or series of meetings during the fourth week -- the progress of the identified educationally deprived student will be evaluated and plans made for implementing the program to meet special reading or math needs of the student for the next four weeks.

   One instrument indispensable to the conference and one to be studied and used in planning will be each student's up-to-date tracking card for Individually Paced Instruction (IPI) in reading or math. These cards provide a record of each student's progress (pre and post test data) and provide information concerning basic skills the student has learned or must learn. This information will form the basis for the individual education plan.

   Since ESEA Title I teacher aides are involved in the instruction of the students and in the record keeping, they will participate in the meetings when the teachers believe they may contribute and their attendance is applicable to the matter in hand.

   A coordination conference form (copy attached) will be used to document action and follow-up on each student.

2. Informal Meetings

   The above teachers will meet informally to discuss problems, progress and the educational plan of individual students as often as necessary.

One anticipated outgrowth of these meetings, aside from student-related benefits, is the involvement of more, and perhaps complex, techniques of collaboration which teachers will employ jointly in helping educationally disadvantaged students reach their highest potential.

The SEA's policy statement also explains:

> Another potential alternative for avoiding supplanting in the use of Title I funds for educationally deprived children, who meet the district-wide criteria for project participation, is the structuring of a self-contained instructional unit. In this setting, the State and local funds generated by the participating children for instructional services must be committed to an instructional program to meet their special educational needs. Title I funds then can be used to make up the difference between the local and state resources available and the resources needed for making an impact on the special educational needs of the most educationally disadvantaged who qualify for participation in a Title I project.

The state's policy paper contains a second pull-out model, which is similar to the "excess costs models" mentioned above. Under this model, the child is not only physically, but in all respects pulled-out from the regular class. The teacher in the second class is responsible for structuring a self-contained instructional unit. An example of this second approach is a high school math program in which the targeted children receive all of their math instruction from a teacher paid for totally from Title I funds. The SEA deemed such a program too supplantive because "every student earns instructional time and support services [paid out of state and local funds] which may not be omitted because a child qualifies for participation in a Title I project."

o Use of Examples to Clarify Duties of Title I Aides -- One SEA has a written policy that clarifies how LEAs may use Title I aides:

> . . . there is confusion among school districts about the duties which Title I aides must perform. These aides may be used only under certain conditions. Their services must be restricted to those children who are identified as receiving Title I services. They may not serve non-Title I children. Therefore, they may be assigned only to teachers who are serving Title I children and who are specifically identified with the methods and procedures of the program. Some examples of unacceptable duties are: cafeteria supervision, study hall supervision, bus duty, playground duties, library duties, and corridor supervision. Duties that are acceptable include: reducing the amount of ESEA Title I teachers' paperwork, giving more individual attention to Title I children, performing clerical duties for Title I teachers only, working with eligible Title I children in instructional activities, but under the direct supervision of the Title I teacher, and working with eligible Title I children in the classroom, outside the classroom, or both.

In addition to the above illustrations, the SEA also includes specific requirements governing the description of duties to be performed by aides:

> Title I aides must supplement the school district's regular program. If a school district hires aides with its local money, these aides must provide services to all children, including Title I children. The activities of the Title I aides must be different from or in addition to the activities of the locally paid aides. Job descriptions should document this.

c. State Policies Which Restrict LEA Options -- States did not always develop flexible policies. During the course of our study, we found three distinct categories of SEA policies restricting program design options. We also found that some SEAs felt they lacked authority to impose additional requirements or restrictive criteria on LEAs.

The first category of restrictive policies includes state policies which define objectively certain federal requirements, which OE intentionally left somewhat open so as not to interfere with the state's discretionary authority to approve LEA applications. The primary example is the concentration requirement which provides that programs must be of "sufficient size, scope, and quality" to provide reasonable promise of success. One SEA has set a minimum figure of $234 per child. A second state has set a range between $330 and $550.

The second category includes policies which are intended to guard against possible audit exceptions. These policies are pursued *either* by choice or because of insufficient understanding of the meaning and scope of the requirements.[244]

The third category of restrictive state policies concerns directly the educational philosophy of the SEAs rather than a fear of audit exception. Some states use the Title I requirements as a means for furthering a state goal. Examples of such state requirements supplementing the federal requirements include: requirements that Title I funds be focused on a particular grade span (e.g., K-6, 7-9, 10-12), mandating individualized instruction and requiring minimum qualifications for all Title I paid staff, including teacher aides.

With respect to SEA authority to impose additional requirements or restrictive criteria on LEAs, one SEA

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[244] For example, one SEA will only approve pull-out type programs under Title I. Another state prohibits program design components which, based on past experience, have been prone to abuse. This SEA flatly prohibits the use of Title I funds to pay for all services which an earlier HEW audit challenged as general aid violations. These included art, music, gym, home economics, band programs which serviced an entire school population (not only educationally deprived children) and support services, e.g., guidance counselors and nurses, which were being supplied to all children. However, the auditors objected only to non-Title I children being served with Title I funds and not to the provision of such services if required to meet the needs of Title I children. It is our conclusion that this state policy was pursued because of a lack of understanding as to the meaning of the audit finding, and a fear of being "burned" again in the future.

Title I official indicated that he believes that the SEA has authority to promulgate general criteria not inconsistent with federal regulations and to require LEAs to comply with such criteria. However, he was uncertain as to whether the SEA had authority to introduce additional criteria not contained in the legislation or regulations.

One State Title I Director indicated that the SEA does not have authority to introduce requirements in addition to those in the Title I legal framework, although he is aware that other SEAs have done so. For example, he does not believe the SEA could mandate that all Title I programs in the state be limited to grades K-3. He indicated that he would feel differently if the state legislature gave the SEA authority to do so. The SEA has issued some rules that interpret requirements in the legal framework. However, the SEA has generally only done this when it can find a specific federal regulation or interpretation that provides authority for the SEA's position.

Another SEA has an unwritten policy that the SEA will refuse to accept any LEA application which calls for library, gym, home economics, music or art programs.[245]

4. Policy Analysis and Recommendations

The new regulations do not address the question of the scope of SEA rule making and interpretation. Nor do they indicate whether an SEA can impose additional or restrictive requirements or criteria on LEAs.

Some SEAs have indicated that they lack authority to issue rules containing additional or restrictive requirements or criteria. Other SEAs have clearly done so. Where this has happened it has usually been (a) as a reaction to a lack of clarity in the federal legal framework; (b) as protection against audit exceptions; or (c) as a matter of educational policy.

The varying SEA perceptions of the authorized scope of SEA rule making and interpretation and the existence of some restrictive SEA policies that go beyond the federal legal framework suggest that a federal clarification of the scope of SEA rule making and interpretation is necessary.

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[245] HEWAA audits and OE Review Team reports concerning this SEA revealed large scale violations in projects involving physical education, libraries, music, and home economics. Although the SEA has not issued any written guidelines prohibiting these types of projects, the earlier violations discovered by OE have resulted in an unwritten SEA policy that applications containing such projects are no longer acceptable.

In enacting Title I, Congress placed significant discretion and responsibility for administration of the program at the state level. However, the federal legal framework is also designed to afford LEAs flexibility, not inconsistent with Title I, in program design. The issue of restrictive state policies that go beyond the minimum requirements set forth in the federal legal framework suggests a possible tension between state discretion and leadership and LEA flexibility in program design. We think these state and local interests can be reconciled by a recommendation that addresses the scope of SEA rule making and interpretation and that flows from the reasons that some SEAs have adopted restrictive policies.

In the previous recommendations contained in this chapter, we recommended, in part, that express authority for additional SEA criteria be included in the federal legal framework and that OE be required to review any such criteria through monitoring and to approve them in writing. Building on this recommendation, we further recommend that the Title I regulations be amended to include with the express grant of authority for additional SEA criteria a definition of the scope of any such SEA criteria, including the extent to which SEAs may impose additional or restrictive requirements or criteria on LEAs.

Related to this recommendation for a clarification of the scope of state Title I criteria are three recommendations designed to address the reasons why some SEAs have adopted restrictive policies or criteria: (a) as a reaction to a lack of clarity in the federal legal framework; (b) as protection against audit exceptions; or (c) as a matter of educational policy.

With respect to the lack of clarity in the federal legal framework, we repeat our earlier recommendation that the Title I regulations be amended (1) to require OE to establish minimum standards for each Title I program requirement,[246] and (2) to include a separate section of the regulations for OE interpretations. This recommendation should remedy the problem of restrictive SEA rules and policies based on restrictive SEA interpretations of the federal legal framework. Where OE has interpreted a requirement different state interpretations should not exist solely because states are unaware of the OE interpretation.

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[246] Recommended minimum standards for LEA program requirements are set forth in another paper prepared for this project: An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grnats Under Title I of the Elementary and Secondary Education Act of 1965. (September, 1977).

As for restrictive SEA criteria or requirements based on a reaction to past audit exceptions, we recommend that the Title I regulations be amended to require OE, if it has not already done so by previous interpretation, to clarify
(1) various legal program design options, and
(2) the circumstances under which specific components may be included. This recommendation should correct the problem of restrictive state interpretations based on a fear of audit exceptions clarifying legal program design options.

With respect to restrictive SEA criteria or interpretations based on educational policy, we recommend that the Title I regulations be amended to clarify the extent to which SEAs may base restrictive rules or interpretations on matters of educational policy not inconsistent with Title I, e.g., an SEA decision to support only K-3 programs or projects. This recommendation should include examples of acceptable restrictive policies or rules based on educational policy and should further clarify the authority of the SEA to exercise such discretion.

CHAPTER 3

TECHNICAL ASSISTANCE

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CHAPTER 3
TECHNICAL ASSISTANCE

I. Introduction

This introduction to the technical assistance chapter contains (1) an overview of the federal legal framework; (2) a discussion of the organization of the chapter; and (3) major issues, findings, conclusions and recommendations in the chapter.

A. Overview of the Federal Legal Framework

The Title I statute addresses the SEA technical assistance function in the context of a statutory provision governing the maximum amount of funds for state administration and technical assistance. The Commissioner is authorized to pay each state amounts equal to the amounts expended by it for the proper and efficient performance of its duties, "including technical assistance for the measurements and evaluations required" by the statute.[247]

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[247] Section 143(b) of Title I (20 U.S.C. 241(g)(b)). The total of such payments may not exceed either one percent of the total SEA allocation or $150,000 ($25,000 for U.S. possessions and territories), whichever sum is greater.

Similarly, the Title I regulations provide that the SEA shall advise the Commissioner of the amounts it needs for administration and technical assistance to LEAs, with respect to the measurement of educational achievement and evaluation programs.[248]

Although the statute and the regulations appear to emphasize technical assistance for evaluation, the legislative history clearly indicates that Congress did not intend to limit SEA technical assistance to evaluation. The legislative history shows that SEA technical assistance should provide LEAs with expertise to improve the quality of Title I programs. The Senate Committee on Labor and Public Welfare stated in its 1970 report that

> As a rule, [LEAs] rely on the [SEAs] for expertise and guidance in meeting the requirements of the law. Since Title I makes funds available for state administration of the program, the [SEAs] can and should assist [LEAs] in planning, developing and evaluating Title I programs and projects.[249]

The informal legal framework also reflects a SEA technical assistance role that is not limited to evaluation. The OE handbook, Conducting On-Site Visits, explains that technical assistance is one of the major purposes of the on-site visit.[250] The handbooks indicates that technical assistance is a process undertaken by the SEA to assist LEAs in a variety of areas, including

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[248] 45 C.F.R. §116.33(c)(1975). See 45 C.F.R. §116.4(1976).

[249] Senate Report 91-634 (1970) U.S. Code Cong. and Admin. News, 2775.

> . . . management procedures, program planning, program content, evaluation, and preparation for the following year's application development[251]

Thus, technical assistance can take many forms in response to different LEA needs. The concept of technical assistance also spans information dissemination and training. For example, OE has stated that SEAs may, as part of their technical assistance to LEAs, involve parent council members in conferences and workshops designed to improve functioning of those councils.[252] In addition, one of the purposes for which Title I Program Support Packages are to be used by SEAs is to provide technical assistance to LEAs.

Through technical assistance to SEAs, OE has attempted to help SEAs discharge their technical assistance responsibilities by providing them with Title I case studies for dissemination to LEAs. Although not intended as models, OE indicated that the case studies could be useful to local planners and administrators in designing Title I projects.[253]

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[250] Conducting On-Site Visits at p. 1.

[251] Id.

[252] Inst. L210-2, Feb. 27, 1976.

[253] Notice L213-3, Feb. 22, 1973.

Other case studies have also been distributed to SEAs. Notice L213-5 (March 26, 1973) transmitted "Model Programs in Compensatory Education." The models discussed objectives, methodology, personnel, inservice training, parent involvement, evaluative data and budgets. The directive indicated that the models were intended to provide guidance to local personnel in designing projects. Information about other exemplary projects has also been disseminated to SEAs after OE has analyzed survey data collected from the States. SEAs have been urged to share the information with LEAs.

B. Organization of the Chapter

Part I of this chapter has set forth an overview of the federal legal framework concerning the SEA technical assistance function. Part II of this chapter analyzes the federal and state legal frameworks for technical assistance and discusses the effect of OE review team reports on SEA interpretation of the function.

The analysis considers the clarity, specificity and scope of the SEA technical assistance function. Recommendations for amendments to the federal legal framework have been made in particular areas.

C. Major Issues, Findings, Conclusions and Recommendations

This section contains a summary of the major findings, conclusions and recommendations about SEA technical assistance The discussion focuses on the emphasis of the statute and regulations on technical assistance for evaluation as compared to broader technical assistance responsibilities; information dissemination as technical assistance; and training as technical assistance.

We found that the Title I statute and regulations do not reflect the full range of SEA technical assistance responsibilities. Instead, we found the Title I statute and regulations emphasize SEA technical assistance for LEA evaluation purposes. The Committee Report,[254] OE's informal legal framework and SEA policies reflect a broader concern. Rather than limit technical assistance to evaluation, it appears that SEAs provide it in a variety of areas and emphasize it at differing stages of Title I program planning and operation. The diversity in SEA technical assistance is perhaps attributable to sources in the informal legal framework that refer to the other purposes of technical assistance, as well as the differences in the particular needs and demands of LEAs.

We recommend that the Title I statute and regulations be amended to reflect the wide range of areas in which technical assistance may be provided, with special emphasis on improving the quality of management procedures, program planning, program content, evaluation, preparation for the following year's application development, and program implementation.

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[254] *See* note 249, *supra*.

With respect to information dissemination as technical assistance, we found that although the federal legal framework does not expressly require SEAs to disseminate specific kinds of information to LEAs, some SEAs have developed written information dissemination procedures. Other SEAs have not done so. Those SEAs which have done so regard information dissemination as a vital part of their technical assistance responsibilities. We recommend that the Title I statute and regulations be amended to require SEAs to develop effective procedures for disseminating to LEAs (1) significant results of relevant educational research; (2) information about successful Title I projects; and (3) such other information as would assist LEAs in planning, developing and implementing Title I programs.

With regard to training as a form of technical assistance, we found that some SEAs were uncertain about both the nature of training which may be supported by Title I and the persons who may participate in such training. Although the revised regulations governing pre-service and inservice training should resolve this uncertainty, we have recommended that OE issue guidelines explaining the application of the supplanting and general aid provisions to the use of Title I funds for pre-service and inservice training.

II. An Analysis of the Clarity, Specificity and Scope of the SEA Technical Assistance Function

A. Introduction

This section will analyze the federal and state legal frameworks for SEA technical assistance. For purposes of this analysis, the discussion has been divided into three sections: (1) the emphasis of the statute and regulations on technical assistance for evaluation, as compared to broader technical assistance responsibilities; (2) information dissemination as technical assistance; and (3) training as technical assistance.

B. Emphasis of the Statute and Regulation on Technical Assistance for Evaluation as Compared to Broader Technical Assistance Responsibilities

1. Federal Legal Framework

The Title I statute authorizes payment to states of the amounts expended in the performance of their duties and includes a specific reference to technical assistance for evaluation as one of the purposes of such payments. The precise language of the statute is:

> (b) The commissioner is authorized to pay each State amounts equal to the amounts expended by it for the proper and efficient performance of its duties under this title including technical assistance for the

> measurements and evaluations required by Section 141(a)(6) except that the total of such payments in any fiscal year shall not exceed --
>
> (1) 1 per centum of the amount allocated to the State and its local educational agencies as determined for that year under this title or
>
> (2) $150,000 or $25,000 in the case of Guam, American Samoa, the Virgin Islands, or the Trust Territory of the Pacific Islands, whichever is greater[255]

Similarly, the Title I regulations provide, in part, that the SEA shall advise the Commissioner of the amounts needed for administration and technical assistance with respect to the measurement of educational achievement and program evaluation.[256] The amounts may not exceed the maximum amount prescribed by statute.[257]

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[255] Section 143(b)(1) and (2) of Title I. (20 U.S.C. 241(g) (b)(1) and (2)).

[256] 45 C.F.R. §116.33(c)(1975). See 45 C.F.R. §116.4(1976) which states that:

> (a) General. The State educational agency for a State for which the Commissioner has approved a plan as specified in §116.3(b), shall be responsible for the proper and efficient performance of the duties of such agency under Title I including compliance with its assurances to the Commissioner and the provision of technical assistance to local and State agencies with respect to the measurements and evaluations such agencies are required to submit pursuant to such Title.
> (b) Amount available for administration. Each State educational agency is entitled to receive for each fiscal year an amount equal to the amount expended by it for performance of its duties under this section but not to exceed the amounts set forth in Section 143(b) of Title I.

[257] See note 247 supra.

OE is required to assist SEAs by providing them with technical assistance so that they may be better prepared to provide their LEAs with needed technical assistance in the area of evaluation. Specifically, the Title I statute provides that:

> The Commissioner shall provide such technical and other assistance as may be necessary to [SEAs] to enable them to assist [LEAs] in the development and application of a systematic evaluation of programs in accordance with the models developed by the Commissioner.258 /

Although the statute and the regulations emphasize technical assistance related to evaluation, the informal legal framework suggests that technical assistance has additional purposes. The handbook for State Title I officials entitled, Title I ESEA: Conducting On-Site Visits states that one of the major purposes of the on-site monitoring visit is to render technical

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258/ Section 151(e) of Title I (20 U.S.C. 241o(e)). The models to which Section 151(e) refers are those which the 1974 Amendments mandate be developed by the Office of Education. Section 151(d) of Title I (20 U.S.C. 241o(d)) directs the Commissioner to provide evaluation models to states for their use in effecting their functions under the Title. The precise language of Section 151(d) is set forth below to clarify the purpose of Section 151(e):

> The Commissioner shall provide to State educational agencies models for evaluations of all programs conducted under this title, for their use in carrying out their functions under Section 142(a) which shall include uniform procedures and criteria to be utilized by local educational agencies, as well as by the State agency in the evaluation of such programs.

See Chapter 8, "Evaluation", for a full discussion of the history of these amendments.

assistance.[259] The assistance may be given in a number of areas, including management procedures, program planning, program content, evaluation and preparation for the following year's application development.[260] If a follow-up visit is deemed necessary, arrangements should be made to provide technical assistance as indicated by the original visit.[261]

2. State Legal Framework

The analysis of state technical assistance policies indicated that despite the emphasis of the statute and regulations on technical assistance for evaluation, different SEAs provide different types of technical assistance. For example, one SEA concentrates much of its technical assistance in the area of parent involvement. Another SEA provides technical assistance to its LEAs primarily during their operational phase, while another SEA gives assistance during the planning, development and implementation of local Title I programs and projects.

One SEA is concerned with technical assistance focused on compliance and program design. In contrast, another SEA perceives its technical assistance role as placing emphasis on program quality rather than on compliance with legal requirements.

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[259] Title I ESEA, Conducting On-Site Visits at pp. 1-2.

[260] Id. at p. 1.

[261] Id. at p. 6.

Another SEA provides workshops for Title I staff in the areas of needs assessment, behavioral objectives, application procedures and financial management. One SEA renders the bulk of its technical assistance during the application process. The decision as to where the assistance should be concentrated during the application process is based upon deficiencies discovered during previous on-site monitoring visits.

3. Policy Analysis and Recommendations

The Title I statute and regulations refer to technical assistance solely within the context of evaluation. Section 143(b) of Title I states that the Commissioner is authorized to pay each state amounts equal to the amounts expended by it for "the proper and efficient performance" of its duties, including technical assistance for the measurements and evaluations required by the state.[262] Technical assistance for purposes other than evaluation, may be construed as essential to "the proper and efficient performance" of a state's duties under this section. The specific reference, however, to technical assistance for the measurements and evaluations required elsewhere by the statute, serves to place emphasis upon the

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262/ See pp. 221-223, supra.

use by SEAs of administrative funds to provide technical assistance for the purpose of evaluation. As was discussed in the introduction of this chapter, state technical assistance is vital to the implementation of every legal requirement, function and the overall quality of Title I programs required by Title I.

Technical assistance for evaluation purposes is highlighted in another section of the Title I statute. Section 151(e) mandates that the Commissioner provide technical assistance to SEAs to the extent necessary to enable the SEAs, in turn, to assist LEAs in the development and application of program evaluation. The entire section is devoted to technical assistance for the purpose of evaluation.

The federal regulations in effect during the ten state survey also make specific reference to the technical assistance function, but only within the context of evaluation. 45 C.F.R. §116.33 (1975) provides that the SEA shall advise the Commissioner of the amounts needed "for administration and technical assistance to local educational agencies with respect to the measurement of educational achievement and evaluation of programs...." (Emphasis added.) The new regulations of 1976 are almost identically worded.[263]

Although we recognize that due to the highly technical nature of developing and applying objective evaluation techniques, assistance in this area is especially crucial, it is possible to infer from the statute and regulations that technical assistance for evaluation purposes should be given priority by the states. We maintain, as the OE handbook (Conducting On-Site Visits) implies, and the legislative history states expressly, that SEA technical assistance in many areas, depending upon the particular needs and capabilities of the LEAs, may be equally as critical and perhaps more so.

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[263] See supra, note 256, supra, for a precise language of 45 C.F.R. §116.4(1976).

Specific references to technical assistance in a variety of areas may be found in the informal federal legal framework.[264] In addition, we found that none of the SEAs included in our survey have construed the technical assistance function to be solely applicable to evaluation. The SEAs have generally provided technical assistance in a variety of areas. We have no knowledge however, as to whether or not other SEAs throughout the nation have similarly construed the meaning of technical assistance. The Title I statute and regulations should reflect the wide range of areas in which states may choose to provide technical assistance. The scope of the technical assistance function, as described in the statute and regulations, should not, even by inference, be limited to evaluation.

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[264] For example, the handbook, Title I ESEA: Conducting On-Site Visits, in reference to the technical assistance which may be provided during an on-site monitoring visit, states on page 1 that:

> The assistance may be given in a number of areas, including, management procedures, program planning, program content, evaluation and preparation for the following year's application development.

In addition, relevant portions of the Title I legislative history were cited in the introduction to this chapter to support the observation that Congress did not intend that technical assistance be provided by SEAs solely for evaluation purposes.

Consequently, we recommend that the Title I statute and regulations be amended to reflect the importance of SEA technical assistance for "management procedures, program planning, program content, evaluation, . . . preparation for the following year's application development"[265] and program implementation.

C. Information Dissemination as Technical Assistance

1. Federal Legal Framework

Although the Title I statute requires that LEAs adopt "effective procedures" for disseminating "significant information derived from educational research, demonstration, and similar projects,"[266] no comparable requirement is expressly imposed on SEAs. However, this responsibility may be implied from the statutory mandate set forth in Section 434(b)(1)(A)(I) of GEPA (20 U.S.C. 1232c(b)(1)(A)(I)) that SEAs must "provide for such methods of administration as are necessary for . . .

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[265] Conducting On-Site Visits at p. 1.

[266] Section 141(a)(10) of Title I (20 U.S.C. 241e(a)(10)).

proper and efficient administration . . . ."

2. State Legal Framework

Five states have written policies concerning information dissemination. These written policies vary in quality and comprehensiveness. It is apparent, however, that these SEAs have developed systems for disseminating information directly to LEAs, although not expressly required to do so. Two of the five written policies indicate that the SEAs disseminate promising information from recent educational research.

One SEA has established a state clearinghouse for outstanding Title I project ideas. The same state has also developed a system to disseminate books, brochures, pamphlets, tapes and films to its LEAs. Another SEA annually presents new developments in specific areas through workshops conducted during its state-wide inservice training conference. The areas covered include needs assessment, behavioral objectives, application procedures and fiscal management. Periodic regional conferences are also conducted by this state.

The remaining state policies are primarily concerned with listing information to be transmitted to LEAs, and clarifying state policy regarding inservice training at the local level. Two SEAs which lack written policies have also begun to disseminate information directly to their LEAs. In short, the majority of SEAs have attempted to fill a perceived void in the federal legal framework even though the precise types of information with which they fill it may vary according to the special needs of the individual SEA and its LEAs.

3. Policy Analysis and Recommendations

The federal legal framework does not expressly require SEAs to disseminate information to the LEAs. However, during the course of providing technical assistance to its LEAs, an SEA must necessarily disseminate certain information to the LEA. Thus, it is reasonable to perceive the information dissemination function as an integral part of technical assistance and "proper and efficient administration."

An examination of the state legal frameworks reveals that some SEAs do not have separate written policies and procedures for information dissemination. However, half the SEAs included in our survey have developed written policies which provide for the direct dissemination of information by the SEA to LEAs, although they are not expressly required to do so. One SEA developed an exemplary approach to information dissemination by developing a state clearinghouse for outstanding ideas on Title I projects. This SEA has developed a system for disseminating the information, as well as for distributing books, borchures, pamphlets, films and other information it determines is relevant to the development of local Title I programs.

All SEAs would agree that some form of "information dissemination" is a routine part of state administration and/or technical assistance. However, the diverse state policies indicate wide variations in SEA perceptions of the nature and type of information that is disseminated. Furthermore, some SEAs do not even have written information dissemination policies or procedures.

We note that the Title I statute expressly requires LEAs to disseminate broad categories of information, but does not impose a complementary requirement on SEAs. SEAs are in an ideal position to identify successful Title I projects and to disseminate information about them to LEAs. Furthermore, SEAs have access to the results of educational research that may be helpful to LEAs. Although the review of the state legal framework indicates that varying types of information are being disseminated to LEAs, we believe, based on interviews with SEA Title I personnel, that LEAs would benefit from more systematic Title I information dissemination by SEAs. Consequently, using the existing LEA information dissemination requirement as a base, we recommend that the Title I statute and regulations be amended to require SEAs to develop effective procedures for disseminating to LEAs (1) significant and relevant information derived from educational research; (2) information about successful Title I projects; and (3) such other information as will assist LEAs in planning, developing and implementing Title I programs.

D. Training As Technical Assistance

1. Federal Legal Framework

Prior to 1974, the Title I legislation did not expressly recognize the training of teachers as a legitimate practice under Title I, although OE has always recognized, in its regulations and guidelines, teacher training as a legitimate practice under Title I. The question has always been which teachers may participate in inservice programs funded with Title I funds and the nature of the inservice training to be offered. Although the provisions set forth in the legal framework generally concern the provision of inservice training by the LEA, the principles set forth therein are equally applicable to training programs operated by SEAs.

The initial set of regulations issued by OE included the provision of inservice training as one acceptable strategy for disseminating information to "teachers and administrators" concerning the latest developments and experiments in education (45 C.F.R. §116.25(1966)). The regulations in effect during our interviews are identical (45 C.F.R. §116.25(1975)).

Program Guide #44, Section 5.4 (March 18, 1968) explained that, "the orientation, indoctrination and development of the personnel who have been selected to conduct the Title I program is probably the most critical phase of the Title I program."

The focus of this guideline is on persons "selected to conduct the Title I program." Although it would appear that only teachers paid in whole or in part with Title I funds could participate, the question remained open.

Program Guide #24 (cancelled September 26, 1972) also discussed teacher inservice training by reiterating the basic principle announced in Program Guide #44 that inservice training "should be limited to training required in coordination with the education of disadvantaged children and to that required for personnel to be employed in the operation of current projects." In addition, the guideline provided that the LEA must assure the SEA that "no more teachers would be trained than could be effectively utilized next year in operational projects for which such training would be required."

Furthermore, the guideline provided that "any inservice training supported under Title I should be limited to training carefully designed or selected to meet requirements for employment in a specific project activity . . ." and that only "individuals who have specific assignments in a Title I project may participate in an inservice training program funded under Title I . . . . Other staff members . . . who will be working with Title I children outside the Title I program may participate in inservice training on a space available basis."

In 1974, amendments to the Title I legislation expressly recognized the "training of teachers" as a legitimate Title I activity.[267]

The legislative history of the Education Amendments of 1974 refers specifically to the training of teachers. Senate Report No. 93-763, 93rd Cong., 2nd Session (1974) at p. 31 provides that:

> Training of special educational personnel to provide the necessary compensatory education and supportive services has been a long standing Title I activity. The committee can even conceive of situations in which some supplementary training for the disadvantaged child's regular classroom teacher is also important in the child's educational development.

House Report No. 93-805 (3 U.S. Code Cong. and Adm. News (1974) at p. 4108) places a slightly different emphasis on the meaning of the addition:

> It is anticipated that the type of teacher training which will be funded will include both training of specialists to deal solely with the educationally deprived and also the training of teachers who are in the regular classrooms but who number the educationally deprived among their students.

2. State Legal Framework

Several states have taken an active role in establishing training policies. Two such states annually conduct statewide compensatory education conferences. One of these states, as a matter of state policy, suggests to its LEAs that they make periodic visits to other LEAs, and that they establish a communications network to disseminate information about promising educational research.

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[267] Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)).

The review of state policies and interviewing with SEA Title I personnel indicated that there is apparently some confusion as to the circumstances under which training is permissible. One state used Title I funds to pay the cost of SEA staff to attend national professional meetings and conferences, where such staff provided technical assistance in the subject matter for which the meeting was held. The SEA expressed uncertainty however, as to the conditions under which its actions are permissible.

Several other SEA Title I Directors expressed some confusion about the circumstances under which it could invite regular classroom teachers who are paid for out of state and local funds to state training sessions, assuming that the regular classroom teachers have, among their students, children who are participating in Title I programs.

3. Policy Analysis and Recommendations

The revised Title I regulations, not in effect during our state interviews, now contain regulations governing inservice training. 45 C.F.R. §116.36(1976) now provides that:

> Payment of Title I funds may be authorized for pre-service and in-service training of persons identified in this section.
>
> (a) Scope of Training. Such training must be directly related to: (1) The services which such persons will perform during the same project year in connection with an approved program or project under Title I; and (2) Their needs for the development of competencies required if the program or project is to be effective in meeting the special educational needs of the identified children to be served in the program or project. Such training must be coordinated with any other training being provided in connection with the program or project.
>
> (b) Eligible Persons. Such training may be provided for: (1) Title I staff members, Parent Council members, and volunteers who are engaged to perform specific services related to approved programs or projects; (2) Non-Title I staff specialists who will be dealing solely with children to be served by the Title I projects, and regular classroom teachers of such children; and (3) The principal of a school for which a Title I program or project has been approved.

The data obtained during the course of the state interviews indicates training is a valuable method of providing technical assistance to LEAs. Although some SEAs have recognized this and, accordingly, have provided statewide and regional training for Title I staff, we found uncertainty among SEA personnel regarding the nature of training which may be financed by Title I funding and the persons who may legally participate.

The new regulations address both of these issues directly, indicating that all Title I staff personnel, as well as school principals and regular classroom teachers of Title I program participants, may participate in Title I funded training so long as the training is sufficiently related to efforts to ensure the effectiveness of the current Title I program.

In our view, the new regulations adequately resolve the uncertainties SEA staff members mentioned during our survey. However, since the new regulations expressly permit the use of Title I funds for training of regular classroom teachers, we recommend that OE prepare guidelines explaining the application of the supplanting and general aid provisions where such training is provided. These guidelines need not establish new principles, they need only explain how existing supplanting and general aid restrictions apply in this specific context.[268]

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[268] The relationship of the supplanting and general aid provisions to staff training is also discussed in Chapter 6 of An Analysis of the Basis for, and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965. (September, 1977).

CHAPTER 4

MONITORING

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CHAPTER 4
MONITORING

I. Introduction

This introduction to the review and analysis of the federal and state legal framework concerning SEA monitoring of Title I programs and projects contains (1) an overview of the federal legal framework; (2) a discussion of the organization of the chapter; and (3) the major issues, findings, conclusions, and recommendations contained in this Chapter.

A. Overview of the Federal Legal Framework

The overview of the federal legal framework concerning SEA monitoring of Title I programs and projects includes (1) the purpose and importance of the requirements and (2) the federal legal framework.

1. Purpose and Importance of the Monitoring Requirement

Monitoring is one of several administrative functions that SEAs must perform under the Title I legal framework. Monitoring, when defined broadly, can include any number of activities. For example, when the SEA reviews an LEA's application, it can be said to be monitoring, i.e., determining whether the proposed programs and projects to be funded under Title I meet the LEA program requirements.[269]

When the SEA reviews a report submitted by an LEA, it can be said to be monitoring the LEA.[270] Further, every time the SEA communicates with an LEA by correspondence, phone, or in some cases by short informal visits to the LEA the SEA is both assisting the LEA and at the same time discovering problem areas.

In addition to the above practices, the SEA is expected to conduct formal on-site visits to the LEAs in the state. The OE handbook, Title I ESEA: How It Works, at p. 42 explains: "the most effective way of monitoring is through on-site visits."

The focus of this chapter is formal on-site monitoring visits. OE has published a handbook for SEAs, Conducting On-Site Visits, which explains the importance, purpose, and scope of an on-site visit as well as suggested techniques to be used during the visits.

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[269] The application approval requirement is analyzed supra, in Chapter 1.

[270] The reporting requirement is analyzed infra, in Chapter 9.

With respect to the importance and purpose of the on-site visits, the handbook explains that the on-site visit should

(1) determine compliance with the legal requirements;

(2) determine fidelity of the project in operation to the project application;

(3) render technical assistance; 271/

(4) identify areas in which further technical assistance may be rendered at some future date; 272/

(5) identify promising practices in compensatory education;

(6) make a judgment as to the educational value of the activities. 273/

For purposes of this paper, three essential components of the SEA monitoring function may be identified from the purposes cited above. Concisely stated, SEA monitoring of Title I programs includes determining:

(1) the legality of the programs and projects (i.e., compliance with the LEA program requirements);

(2) the fidelity of the Title I program with the project application (i.e., is the LEA's program being implemented pursuant to the design indicated in the application); and

(3) the quality of the services provided to participating children (i.e., do the services being provided appear to be meeting the needs of the children in the program.).

271/ The technical assistance function is discussed in detail in Chapter 3, Technical Assistance.

272/ *Id.*

273/ Title I ESEA: Conducting On-Site Visits, at p. 1.

The legislative history includes several statements expressing the importance of the monitoring function. For example, in 1969, the Senate Labor and Public Welfare Committee explained that

> The Committee wishes to express its deep concern about the necessity for stronger enforcement of Title I requirements by both federal and state agencies in monitoring the legitimate and effective use of Title I funds by local educational agencies. [Emphasis added.][274]

In 1974, the House Education and Labor Committee, in the course of describing the basic responsibilities of the LEAs and SEAs, explained that

> The heart of the program is that [LEAs] must assess the special needs of their educationally deprived children and must formulate programs to meet those needs with the Title I assistance. [SEAs] review and approve the application submitted by local school districts and then monitor and evaluate their programs. [Emphasis added.][275]

A recent GAO study, in the course of describing some of the major weaknesses of SEA performance of the function, also explained the major purposes which must be, but were not being performed by several SEAs included in their study.[276]

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[274] S. Rpt. No. 91-634, (1970) U.S. Code Cong. and Adm. News 2776.

[275] H. Rpt. No. 93-805, (1974) U.S. Code Cong. and Adm. News 4094.

[276] Report to the Congress by the Comptroller General of the United States: Assessment of Reading Activities Under the Federal Program of Aid for Educationally Deprived Children (December 12, 1975).

In general, the report cites a need for improved SEA monitoring systems. The GAO study found that about 35% of the SEAs visited as part of the study upon which the report was based, had no formal monitoring systems. The report criticized the informal nature of monitoring procedures which were encountered at one SEA and the fact that written reports on the visits were not made. The report noted the comments of one SEA official that because of a lack of funds only those LEAs experiencing serious difficulties were monitored. The report also stated that SEA monitoring visits were generally too brief:

> For example, one SEA's monitoring visits ranged from one-third of a day for one staff member at an LEA with one school to two or three days for four staff members at an LEA with 14 elementary schools. 277/

The report further stated that the brevity of the visits undermined an important component of the SEA monitoring function: the process of making a judgment as to program quality. Specifically, it stated that

> . . . most of the monitoring team's time was spent in meetings and discussions with LEA officials and school principals; little or no time was spent in school classrooms observing the quality of Title I services. 278/

277/ *Id*. at p. 14.

278/ *Id*.

The report concluded that the SEAs reviewed "need to establish monitoring systems, formalize existing systems, or conduct more in-depth reviews during monitoring visits if those visits are to be useful in evaluating LEA performance."[279]

It is significant to note that OE, in response to the GAO report, indicated its awareness of some of the major weaknesses of SEA administration of the function and cited steps it has taken and will take to strengthen the monitoring function. OE stated that

> Annual program reviews of each State's Title I administration include a critique of the monitoring done by the SEA. This procedure will be continued along with the practice of, both verbally and in writing, assessing the effectiveness of the State's effort in the areas observed, recommending modifications where necessary, and requesting the State to communicate the action it takes or plans to take to implement recommendations.[280]

In sum, the monitoring function is an important component of the SEA's overall responsibility of properly and efficiently overseeing the operation of Title I programs and projects at the local level.

2. Federal Legal Framework

Under the present federal legal framework, specific references to the monitoring function performed by SEAs are contained in the regulations implementing the GEPA statutory provision which requires that

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[279] *Id.* at p. 15.

[280] *Id.*

> the State will, through its State educational agency, provide for such methods of administration as are necessary for the proper and efficient administration of the programs to which the general application applies. 281/

The GEPA regulations implement this provision and refer to the SEA monitoring function. The regulations require that SEAs constantly monitor each function or activity of each grant as set forth in the state approved application to assure that adequate progress is being made toward achieving goals of the grant. The precise language is:

> State agencies shall constantly monitor performance under federally-supported activities to assure that adequate progress is being made towards achieving the goals of the grant. This review shall be made for each function or activity of each grant as set forth in the approved State plan or application. 282/

The most comprehensive OE policy statement on monitoring is the handbook for state Title I officials entitled,

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281/ Section 434(b)(1)(A)(I) of GEPA (20 U.S.C. 1232c(b)(1)(A)(I)); See also Section 142 of Title I (20 U.S.C. 241f). Recall that the GEPA statute and regulations include policies which are applicable to the administration of numerous federal education laws, including Title I.

282/ 45 C.F.R. §100b.431 (1975).

Conducting On-Site Visits. It provides a detailed model for SEAs to follow in carrying out their statutory and regulatory obligations, procedures to be followed in preparation for on-site visits and an extensive checklist for use during the visit itself.[283]

In addition to the handbook, the OE Program Directive System gives SEAs guidance about monitoring. However, most of the directives which may be interpreted as related to monitoring do not expressly use the term monitoring. Rather, guidelines are issued which are in some manner designed to assure that SEAs are overseeing or checking whether LEAs are performing in accord with a particular requirement. For example, the purpose of Inst. L209.1 (August 29, 1972) was to insure that SEAs provide OE with data about the status of LEA comparability reporting. Implicitly, to report on the adequacy of LEA comparability reports, the SEA must "monitor" the compliance by LEAs with the comparability function.

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[283] The program visit checklist contains a series of questions in each of the following areas: attendance areas, participants and services, supportive services, staffing and staff development, parental involvement, dissemination, evaluation, and financial management. In addition, there is a separate checklist for visits to individual projects. The checklists are apparently designed to effectuate the purposes cited above, as well as for use in rendering technical assistance and identifying promising practices and areas of weakness.

OE has also developed a Program Support Package entitled, Title I On-Site Visits. It provides, in graphic form, an overview of the purposes, preparation for, conduct of and follow-up of Title I on-site visits.

The OE handbook and Program Support Package interpret and explain, among other things, the scope of the on-site visit, the frequency of such visits and the procedures to be followed both by the LEA and the SEA. Set forth below is a summary of the policies included in these documents.

a. Scope of the Monitoring Visits -- As explained supra., the GEPA regulations require that SEAs constantly monitor performance with respect to "each function or activity of each grant." The on-site handbook explains that the monitoring visit should determine, among other things, the degree of compliance with the Title I program requirements, the fidelity of the program with the design included in the LEA's Title I application, and the quality of the actual program. The handbook, Title I: ESEA -- How It Works, explains at p. 43 that, unless an on-site visit is specifically undertaken in response to a complaint concerning, for example, compliance with a particular requirement, or to clarify the district's application; during the on-site visit the SEA monitors must consider, "at least the following items: target area selection, comparability, parental involvement, private school involvement, needs assessment, project objectives, instructional program development, project implementation, evaluation, financial management, dissemination activities, and handling of complaints."

The on-site handbook includes suggested questions SEAs should ask about the following LEA program requirements: school attendance area eligibility and targeting, participants and services, supportive services, staffing and staff development, parental involvement, dissemination, evaluation, and financial management.

b. Frequency/Constancy of On-Site Visits -- The GEPA regulations provide that SEAs must "constantly monitor" each function or activity of each grant as set forth in the approved state plan or application, to assure that adequate progress is being made toward achieving the goals of the grant.[284] Neither the Title I statute nor the federal regulations explain the meaning of this phrase as it applies to Title I. The OE handbook, Conducting On-Site Visits refers to "the annual or periodic visit" in the section which describes the purposes of an on-site visit. The handbook states,

> At a minimum, the purpose of the annual or periodic visit (as opposed to a special visit) should include both monitoring and technical assistance.[285]

284/ 45 C.F.R. §100b.431 (1975).

285/ Title I ESEA: Conducting On-Site Visits at p. 2.

It should be noted, however, that this same handbook, in explaining the basic decisions the SEA must make with respect to the design of on-site visits, includes the following question: "Should there be a concentration on large programs, with only biennial visits made to smaller programs?"

c. On-Site Monitoring Procedures -- The on-site handbook prepared by OE generally explains the procedures which the SEA should pursue in performing its monitoring function. Specifically, the handbook states that the SEA should, among other things,

(1) determine the purposes and objectives of the visit;

(2) send a checklist to be used to the LEA in advance;

(3) request pre-visit information, for example, a pre-visit inventory or possibly a self-evaluation;

(4) specify the data to be reviewed;

(5) specify the persons to be interviewed;

(6) visit projects in operation;

(7) write a preliminary report to the superintendent;

(8) prepare a written report of the visit, including a request for a response within a specified period and call for a suggested timetable from the LEA for the accomplishment of recommended activities, and

(9) establish systematic procedures for follow-up visits including

(a) procedures to incorporate the results of the visit into the development of the next year's application;

(b) procedures to ensure that the results of the visit are considered in the SEA's review and approval of next year's application;

(c) periodic checks concerning the implementation of recommendations, and

(d) dissemination of results of visit to principals, teachers and parents.

B. Organization of the Chapter

Part I of this chapter has set forth an overview of the federal legal framework concerning the SEA monitoring function. Part II of this chapter analyzes the federal and state legal frameworks for monitoring and discusses the effect of OE program reviews on SEA performance of this function.

The analysis considers the clarity, specificity and scope of the monitoring requirement, and incorporates state interpretations as set forth in the state legal framework. Several recommendations for modification and additions to the federal legal framework are included.

C. Major Issues, Findings, Conclusions, and Recommendations

We found that the GEPA regulations governing monitoring do not set forth minimum standards for SEA monitoring. Furthermore, the Title I regulations do not expressly refer to monitoring and the major OE policy statement on Title I monitoring, Conducting On-Site Visits, is outdated and has been superseded by the revised regulations. We also found that the monitoring instruments prepared by most SEAs included in our survey were generally insufficient to satisfy the GEPA monitoring provision that program activities meet the basic Title I requirements.

In addition, the OE monitoring handbook is not comprehensive, particularly with respect to the list of monitoring requirements it contains.

In order that SEAs may clearly understand their Title I monitoring responsibilities, we recommend that the Title I regulations be amended to include a separate section on monitoring which includes minimum standards for SEA monitoring of Title I programs.[286] We further recommend that such regulations reiterate the basic purposes of monitoring, explaining which activities SEAs must undertake to fulfill the requirement and which activities may be considered optional. SEAs must determine whether LEAs are complying with each major program requirement, that each Title I program is being implemented in accord with the program design set forth in the state approved application and that the overall quality of each Title I program is assessed.

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[286] See p. 257 and note 292, infra, for a discussion of the rationale for recommending that the Title I regulations be amended instead of the GEPA regulations.

Moreover, we recommend that each SEA be required to develop a new OE certified monitoring instrument which must include all program requirements and which shall be updated to reflect changes in the federal legal framework as necessary.

With respect to the frequency and constancy of the monitoring requirement, we found that the federal legal framework is unclear as to the meaning of "constantly monitor." We found variations among SEAs as to the frequency of their monitoring efforts, primarily due to the ambiguity of the federal legal framework and constraints of time, staff and resources. We recommend that OE define through regulations the meaning of "constantly monitor" as it relates to the size and number of LEAs within an SEA.

With respect to procedures for conducting a monitoring visit, we found, based upon a review and analysis of the federal and state legal frameworks, that specific procedures were identified which should be incorporated in the monitoring regulations.

Many of these procedures are found in the OE handbook, Conducting On-Site Visits and have been adopted by some

SEAs as part of their monitoring procedures. Other SEAs, however, chose not to utilize many of the procedures contained in the handbook.

Procedures for conducting an on-site monitoring visit are an important part of minimum standards for SEA monitoring of Title I programs. Consequently, we recommend that amended regulations provide that

- the submission of pre-visit self evaluation reports based on the SEA monitoring instrument be required of LEAs in advance of the monitoring visit so that time can be more effectively utilized during the actual visit;
- a visit to a Title I project be made a mandatory part of each SEA on-site visit, so that the quality of services rendered may be assessed;
- SEA monitoring personnel be required to undergo extensive training and that the SEA develop a state monitoring policy manual for their use in an effort to promote uniform monitoring practices within the state;
- the SEA be required to distribute a copy of the monitoring report and LEA response to parents, private school officials and teachers;
- an entrance conference to explain the purpose and scope of the visit be mandatory;
- following an on-site visit, a preliminary report be made by the SEA to be followed by a written report requesting a response from the LEA within a certain time;
- formal follow-up procedures described in the OE handbook be adopted.

II. An Analysis of the Federal and State Legal Frameworks for Monitoring

A. Introduction

This section of the paper will describe and analyze the federal and state policies and procedures concerning the proper and efficient monitoring of Title I programs designed and implemented by local school districts.

This section of the paper will analyze the following major areas of concern with respect to the monitoring requirement: (a) scope of the monitoring function; (b) frequency/constancy of the on-site visits, and (c) procedures established for effecting the monitoring function.

B. Scope of the Monitoring Function

1. Federal Legal Framework

The GEPA regulations provide that the SEA must constantly monitor "each activity" assisted under Title I to assure adequate progress toward achieving the goals of the legislation.[287] The OE handbook, Conducting On-Site Visits[288] explains that the on-site visit must determine, among other things, (a) compliance with the applicable LEA program requirements; (b) fidelity of project operation to the project application, and (c) the educational value of the Title I activities (quality).

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[287] 45 C.F.R. §100b.431(1975).

[288] *See* p. 240, *supra*.

This handbook and a handbook entitled, Title I ESEA: How It Works, explain that at a minimum, the regularly scheduled on-site visit should determine compliance with the following LEA program requirements: school attendance area eligibility and targeting, eligibility and targeting of children, comparability, parent involvement, private school involvement, needs assessment, project objectives, instructional program development, project implementation, evaluation, financial management, dissemination, and handling of complaints.[289]

2. State Legal Framework

The monitoring instruments and formal policies developed by the SEAs included in our survey reflect differing interpretations of the scope of the monitoring requirement. In several states the primary focus of the on-site visits is to determine compliance with certain of the Title I requirements and fidelity with the Title I application, withlittle or no emphasis placed on ascertaining the quality of the program. In other states, the SEA policies and instruments focus primarily on ascertaining the quality of the program as well as providing technical assistance. In one state the SEA has developed a comprehensive policy which suggests conformity with all three purposes, i.e., compliance, fidelity and quality.

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[289] See pp. 246-247, supra.

In most of the states included in our study, the monitoring instruments were generally not comprehensive with respect to determining the extent of compliance with all of the major LEA program requirements and with respect to the key elements of each requirement.

For example, one SEA's monitoring instrument made no or cursory reference to such requirements as: maintenance of effort, "supplement, not supplant", "access to information", and "general aid". A second state makes no reference in its monitoring instrument to such requirements as: maintenance of comparability, concentration, maintenance of effort, school attendance area eligibility, eligibility of children, general aid or supplanting. The instrument prepared by the SEA generally is concerned with ascertaining fidelity with the application and program quality issues.

The question as to the quality and degree of comprehensiveness of the state monitoring instruments with respect to each major LEA program requirement is analyzed in a separate paper prepared by the Legal Standards Project.[290]

3. Policy Analysis and Recommendations

At the outset we note that the OE handbook, Conducting On-Site Visits has been superseded by the revised Title I regulations and that the revised Title I regulations are silent about SEA monitoring responsibilities.

With respect to the state legal framework, we found, based on an analysis of the materials prepared by states included in our survey and interviews with SEA Title I personnel, that several states do not emphasize all three components of the on-site monitoring visit. Furthermore, the monitoring instruments prepared by the states were generally not sufficient to satisfy the basic requirement contained in the GEPA regulations requiring a determination that a review be made of each function or activity set forth in the application.

We also found that the handbook developed by OE was not comprehensive, both in terms of the list of monitoring requirements and the model questions included with respect to the requirements deemed important. Furthermore, the handbook is out of date and has been superseded.

290/ See An Analysis of the Basis for, and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965 (September, 1977).

SEA monitoring is an important part of state administration. Yet the only current guidance about monitoring is contained in a broad general provision of the GEPA regulations, i.e., SEA shall "constantly monitor . . . each function or activity of each grantee."[291] We have concluded, based on our review of SEA monitoring policies and instruments, that the GEPA regulation governing monitoring does not set forth minimum standards for SEA monitoring.

However, the GEPA regulations are applicable to many OE programs other than Title I. Rather than attempt to make the GEPA regulations Title I specific, we recommend that OE (1) include a separate section on SEA monitoring in the Title I regulations; and (2) included in that section minimum standards for SEA monitoring of Title I.[292]

Specifically, the regulations should reiterate the basic purposes of the on-site visit and explain which purposes must be performed and which are optional, depending on the time constraints. We further recommend that, at a minimum, the regulations require the SEA to (1) determine compliance with each major program requirement;[293] (2) determine that the program is being implemented in accordance with the program design included in the Title I application, and (3) assess the quality of the Title I programs.

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[291] 45 C.F.R. §100b.431(1975). Several such standards are recommended at pp.263-273, *infra*.

[292] Of course, another option for OE would be to upgrade the quality of the GEPA regulation governing SEA monitoring by incorporating into it minimum standards. However, since we are not certain of how this might impact on other OE programs governed by the GEPA regulations, we have recommended that the subject of SEA monitoring be addressed in Title I regulations.

With respect to the monitoring instrument we recommend that OE develop a model monitoring instrument which includes questions relating to all the major program requirements, and the major aspects of each requirement. This model monitoring instrument should be updated, when necessary, to reflect changes in the statute or regulations.

This instrument should serve as a model for the states. We are not recommending that the states adopt the identical form. However, to the extent that the SEA develops its own monitoring instrument, we recommend that OE require that the instrument be sufficiently comprehensive to enable the state monitors to determine that the programs and projects paid for under Title I are being implemented in accordance with the relevant LEA program requirements.

Finally, we recommend that OE, in the course of conducting its periodic program review of the states, be required to certify as to the sufficiency of the state's monitoring instrument and that, where the OE monitors find that the instrument is inadequate, that OE not approve the state's plans in subsequent years until a satisfactory instrument has been developed.

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[293] The major requirements applicable to LEAs are described at pp. 41-47, *supra*.

This latter recommendation is included to ensure that the SEAs satisfactorily perform the important function of ensuring compliance with the relevant Title I requirements and fidelity with its Title I application.

C. Frequency/Constancy of Monitoring Visits

1. Federal Legal Framework

The federal regulations provide that the SEA must "constantly monitor" LEA program activities.[294] The OE handbook Conducting On-Site Visits explains, at p. 2, that the on-site visit should be "annual or periodic" and then indicates (p.4) that the SEA may wish to conduct an on-site visit annually for larger programs and biennially for smaller programs.

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[294] 45 C.F.R. §100b.431(1975).

2. State Legal Framework

Not every state included in our survey conducts an annual on-site visit to each of its LEAs operating a Title I program. Three states included in the survey tend to visit their large districts on an annual basis while visiting the remaining LEAs biennially or where the need is most apparent. The larger SEAs generally indicated that it was impractical, if not impossible, to visit each LEA on an annual basis. In SEAs with many LEAs, the SEA tended to concentrate its resources on monitoring the larger LEAs with many component schools and Title I projects. These SEAs perceived that the limitations of time, staff and other resources demanded that they develop priorities, which generally resulted in larger LEAs or those experiencing serious difficulties receiving the bulk of SEA monitoring resources.

The review of state monitoring policies also indicated that at least one SEA does not visit a Title I project in action as part of its on-site monitoring review. There was no indication in the materials collected from three of the states as to whether a visit to a Title I project is routinely conducted.

We also found during the course of the state interviews that informal communications between SEA officials and the LEAs often occur. For example, an LEA may telephone or write to the SEA concerning the legality of practices about which it is uncertain. The SEA may respond by making a judgment about the practice in question, and conveying its determination to the LEA.

Our interviews and observations during visits to SEAs revealed that in some instances, SEA Title I staff routinely make informal visits to LEAs. During the course of such visits, LEA practices which warrant revision may come to the attention of the SEA Title I staff. The SEA Title I staff will then avail itself of the opportunity to cite such deficiencies and perhaps aid the LEA in correcting the deficiencies which have been observed during such an informal visit. A further opportunity for SEAs to informally monitor may occur during the application approval process, or during the course of SEA provided technical assistance. Thus, it appears that, in addition to the fact that SEAs periodically conduct formal, on-site monitoring visits to its LEAs, there are indications that some SEAs attempt to monitor Title I activities informally and on as constant a basis as they can in the absence of a clear definition of the regulatory obligation to "constantly monitor".

3. Policy Analysis and Recommendations

It is unclear whether the federal legal framework requires that each LEA program be monitored on an annual basis, i.e., the meaning of the phrase "constantly monitor" is not clearly defined.

In addition, it was evident from much of the material compiled from the ten state survey that both very large and small states find it particularly difficult because of time, personnel and fiscal constraints, to make an annual on-site monitoring visit to each of their LEAs conducting Title I programs. For such states the annual visit was said to be impractical, if not impossible.

We recommend that OE include in the recommended Title I monitoring regulation an interpretation of what it means to "constantly monitor" Title I programs. In other words, OE should attempt to define "constantly monitor" in terms of the size of the state, the number of LEAs in the state, and the size of the LEAs. LEAs with larger Title I programs should be monitored on an annual basis.

D. Procedures for Conducting an On-Site Monitoring Visit

1. Introduction

The federal and state legal frameworks reviewed by the Project include specific policies prescribing the procedures used for purposes of conducting on-site monitoring visits. This section will describe and analyze ten specific policies or procedures applicable to on-site visits. Because the relevant sections of the federal and state legal frameworks are not extensive, we will not include separate subheadings marked "Federal Legal Framework", "State Legal Framework" and "Policy Analysis and Recommendations" under each aspect of the monitoring procedure. In several cases we recommend that the OE policies presently set forth in the manual, Conducting On-Site Visits, be made "mandatory", i.e., the regulations be expressly amended to reflect these minimum procedural requirements.

2. Determine the Scope and Objectives of the On-Site Visit

The OE handbook entitled, Conducting On-Site Visits, explains that the first step in planning an on-site visit is to determine the scope of the visit. Our analysis and recommendations concerning this requirement are set forth *supra*.

3. Request Pre-Visit Information

The on-site handbook explains that the SEA should request "any pre-visit information that is needed, such as a pre-visit inventory", the handbook also suggests that the SEA "might consider having the LEA do a self-evaluation prior to the visit" based on the monitoring checklist to be used by the SEA.

Four of the states included in our survey require that LEAs to be monitored submit in advance of a planned monitoring visit, self-evaluation or inventory data. However, in several of the other states, LEAs are not even provided copies of the SEA monitoring checklist.

A major concern expressed by SEAs regarding their ability to monitor effectively is the severe time pressures under which SEAs could alleviate such problems would be for SEAs to require that LEAs submit self-evaluative reports, based on the SEA's monitoring checklist, in advance of the scheduled visit. The concept of self-evaluation is frequently used in other contexts as an effective managerial device.

We recommend that (a) prior to a formal on-site visit, LEAs be required to submit to the SEA a pre-visit self-evaluation report: (b) such reports be based on the SEA's monitoring instrument which will be sent to the SEA well in advance of the scheduled visit; and (c) the LEA transmit other documents and worksheets which may be reviewed at the state's offices so as to save time once the SEA begins the on-site visit.

4. Entrance Conference

The on-site handbook suggests that the SEA commence its visit by, among other things, explaining (a) the purposes and scope of the visit; (b) the documents to be reviewed, and (c) the persons to be interviewed (Title I Coordinator, principals, teachers, parents, and children). Most of the states included in our survey explained that their policy was consistent with the above suggestions. We recommend that this policy be made mandatory.

5. Visits to Programs in Operation

Although the current handbook states that a monitoring visit which does not include a visit to a Title I project while in operation is incomplete, some SEAs, because of time constraints do not make formal on-site visits to projects. The on-site aspect of the monitoring requirement is particularly important to effective monitoring and should be a required procedure. The failure of some SEAs to assure that visits to projects are undertaken may be attributable to a perception by those SEAs that they need follow mandates contained in the on-site handbook only when it is convenient to do so. We recommend that provisions must be made to include a visit to at least one Title I project while in operation as part of every on-site monitoring visit.

6. Visit to Non-Title I Schools for Purposes of Determining Compliance with the Comparability and "Equitably Provided" Requirements

It is inherent in fulfilling the comparability requirement[295] and the requirement that project area schools not be penalized in the provision of services provided to non-project area schools with state and local funds, i.e., such services must be equitably provided,[296] that monitoring teams make a comparison between services provided at Title I schools and services provided at schools not funded by Title I. These requirements are basic to the Title I program, since Title I was enacted to raise the educational achievement of educationally deprived children residing in low income areas by providing them with services wholly supplemental to those services which would ordinarily be provided them by state and local governments. Although it should be apparent from the GEPA regulation that SEAs have an obligation to assure compliance with the comparability requirement, and accordingly adopt the necessary procedures, SEAs have not done so. Such a requirement is essential so that monitors can independently judge whether or not the services received by children attending Title I schools are equitably

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295/ 45 C.F.R. §116a.26(1976). See also Chapter 10 of a separate paper prepared by the Project entitled, An Analysis of the Basis for, and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965, (September, 1977).

296/ 45 C.F.R. §116a.22(b)(10)(1976).

provided and, where comparability is computed, that prior to the addition of Title I funds, instructional services are approximately equal to services received by children attending schools in areas which do not receive Title I funds.

Additionally, this type of review would further assure that representations made by LEAs in their applications and comparability reports are accurate. It must be repeated here that fidelity of the application and reports of programs and projects in operation is one SEA monitoring responsibility described in the OE handbook. The preceding analysis is but one example of a procedure which is inherently part of the SEA's responsibility to monitor comparability.

We recommend that (1) SEAs be required to develop procedures governing SEA inspection of the records of a representative sampling of non-Title I schools for the purpose of monitoring compliance with the comparability requirement and (2) monitors review records and make on-site inspections concerning the comparability criteria set forth in 45 C.F.R. §116a.26(1976).

7. Training of SEA Personnel

The provision of inservice training for persons responsible for performing an on-site monitoring visit is presumed by statutory mandate that the SEA "properly and efficiently" administer the Title I program. Several of the states included in our survey use consultants, who are not working full time on the SEA Title I staff, to conduct their on-site reviews. Other states have developed a system whereby their operations are regionalized.

Although in each of these states the SEA has prepared a monitoring instrument which includes instructions, we cannot be certain how such persons can "properly and efficiently" make uniform determinations about compliance with LEA program requirements if they have not been specially trained and do not have a state Title I policy manual. Although these states do have different types of Title I policies which vary in quality and comprehensiveness, none has a manual sufficiently comprehensive to insure uniform monitoring determinations by consultants or regional staff.

In short, we question whether a state that uses outside consultants, or which is regionalized, can determine compliance with the Title I requirements in a uniform fashion absent the presence of such a policy manual. We recommend that such a manual, supplementing a policy manual developed by OE, be developed by each state, but especially in those states employing the administrative strategies described above. We further recommend that SEAs be required to provide extreme training for SEA Title I monitors.

8. Exit Reports

The OE on-site monitoring handbook provides that a SEA monitor should make a preliminary report of his/her visit before leaving, including "first reactions". Within a short period thereafter, OE suggests that the SEA staff prepare a written report concerning the strengths and weaknesses. Furthermore, "It should request a response within a certain period of time and call for a projected timetable from the LEA for the accomplishment of recommended activities."

Many of the SEAs included in our survey explained that they pursued a policy similar to that described above. However, in most cases the procedure was not formalized. One SEA requires a follow-up letter citing deficiencies only when such deficiencies are gross. In one state, the SEA monitors do not respond in writing. The Title I Director explained that he can be more effective if he does not place things in writing. He prefers to "convince" or "strongly encourage" that the LEA make appropriate changes.

We recommend that the SEA be required to establish formalized procedures with respect to the preparation of monitoring reports and responses by the LEAs. The monitoring report is of central importance to ensuring that Title I programs are implemented pursuant to the application and in accordance with the Title I requirements. The monitoring report will be evidence that the SEA has properly and efficiently administered the program. Furthermore, as explained below and in the chapter concerning financial management, this report should be used by the SEA in performing its application approval and auditing responsibilities.

9. Follow-Up on On-Site Visits -- With reference to following-up on the on-site visits, the OE handbook lists several procedures which the SEAs should undertake. The specific suggestions are listed below.

> a. The LEA should establish systematic procedures to incorporate the results of the visit into the development of next year's application (with the SEA's assistance if needed).
>
> b. The SEA should outline procedures to insure that the results of the visit are considered in the review and approval of the next year's application.
>
> c. Arrangements should be made to provide technical assistance, dissemination, etc., as indicated by the visit.
>
> d. The SEA should check back with the LEA on the implementation of recommendations. 297/

Six states indicate that follow-up visits are conducted where an LEA which is having difficulty in complying with Title I requirements. Usually, follow-ups are conducted where violations are significant and there has been no indication of remediation, or, where violations are continuing

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297/ See OE handbook, Conducting On-Site Visits.

or if the program in operation is not reflective of its state approved application. Only half the states included in this review make an attempt to incorporate the results of the monitoring visit into the following year's grant application procedures.

In sum, several of the SEAs in our survey have adopted follow-up procedures. However, such procedures were not adopted in several other states. It is reasonable to assume that the absence of follow-up procedures, particularly where deficiencies are recurring, may actually encourage non-compliance with legal requirements since the LEA is not held accountable for making necessary modifications to its program.

We recommend that follow-up procedures presently suggested by conducting on-site visits be required.

10. Dissemination of the Report

The "on-site" handbook at p. 6 explains that, "the LEA should arrange to provide information concerning the visit to principals, teachers, parents, private school representatives, etc." We found that several SEAs pursued such a policy. However, most states indicated that such reports were not furnished to such persons automatically, although all states indicated that they would be supplied to an individual, upon request.

We recommend that the SEA, rather than the LEA, be required to send copies of the SEA monitoring report, accompanied by the

LEA response, to all of the parties described above. It is important that all parties affected by the report be knowledgeable as to the strengths and weaknesses of the program in order to facilitate improvement. With respect to parents, the Title I regulations expressly provide that parents should be involved in the "planning, implementation, and evaluation of Title I programs."[298/] Such involvement requires a sufficient level of knowledge and understanding with respect to the operation of the program.

E. The Effect of Office of Education Review Team Reports on SEAs

1. Introduction

It is difficult to assess the nature of policies and practices among the various SEAs without considering the relationship between the Office of Education and the SEAs.

[298/] 45 C.F.R. §116a.25(1976). See also Chapter 3 of a separate paper prepared by the Project entitled, An Analysis of the Basis for and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965 (September 1977).

With respect to the monitoring function, the relationship between OE and the various SEAs, as well as the influence of OE upon the SEAs, may be assessed by examining the content of OE Review Team Reports and SEA responses to those reports. This portion of the monitoring paper will cite instances where OE appears to have had a direct impact upon the SEA legal framework.

2. Instances Where OE Has Influenced SEA Policies and Practices

a. Lack of Compliance with the Monitoring Function -- One SEA examined as part of the ten state survey had shown a total lack of compliance with its monitoring function. Prior to 1970, this SEA was prohibited by the State Superintendent of Education from conducting on-site monitoring. The OE Review Team Report of 1971 cited the state's failure to develop a monitoring instrument and its failure to monitor Title I programs and projects within its jurisdiction. Consequently, the SEA developed a monitoring instrument and began to execute the function. OE began to monitor this SEA's state guidelines, including the monitoring instrument. Later OE Review Team Reports commented on the positive steps that the SEA had taken in response to its recommendations.

b. Recommendations by OE to Promote More Efficient Monitoring Procedures -- An OE Review Team recommended that one SEA streamline its monitoring procedures so that the number of LEAs it visited each year could be increased. A 1973 OE Review Team Report noted that although the SEA's present procedure was comprehensive, as a result of the time expended by staff members in effecting that procedure, only one third of the state's LEAs were visited annually. As a result of the OE recommendation, the SEA developed a more efficient procedure and substantially increased the number of LEAs it annually visited thereafter.

Similarly, OE recommended to another SEA that it reallocate a greater portion of its personnel and administrative funds to the high priority monitoring function. OE noted in a 1974 letter to the SEA that the number of Title I projects it monitored was inadequate. The SEA had only monitored 30 projects out of at least 2,500 in the state. OE recommended that projects which received the sum of $500,000 or more be monitored annually and the remainder on a biannual basis. In addition, OE found that follow-up letters were not sent to LEAs and recommended that such a policy be instituted as well as follow-up procedures to insure that LEAs make necessary program changes.

The SEA's initial response was to increase the number of participating districts it monitored to somewhat less than

15%. OE found the increase to be insubstantial. Adequate follow-up procedures, however, were implemented. The SEA later indicated, in a 1975 letter to OE that it planned to conduct on-site visits to more than 700 Title I schools during the coming academic year. Such an increase represents a substantial departure from this SEA's prior policy.

With respect to conclusions about SEA compliance with the monitoring requirement, it appears that, where OE has found problems with the manner in which the SEA is performing this role, the SEAs, in the main, appeared willing to change their policies and procedures. However, interviews with SEA personnel revealed that some states still strongly resent "OE interference" with their administration of the Title I program. Nevertheless, in view of the importance of SEA monitoring, we recommend that OE continue to focus attention on this aspect of SEA Title I administration.

CHAPTER 5

GRANT DISTRIBUTION

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CHAPTER 5
GRANT DISTRIBUTION

I. Introduction

This introduction to the grant distribution chapter contains (1) an overview of the federal legal framework; (2) a discussion of the organization of the chapter; and (3) a summary of the major issues, findings, conclusions and recommendations contained in the chapter.

A. Overview of the Federal Legal Framework

Title I authorizes the Commissioner to make payments to SEAs for "grants made on the basis of entitlements created under this Title." [299] The Commissioner has the express responsibility for determining local educational agency (LEA) maximum grants based on the number of children from low-income families residing in each school district "where satisfactory data...are available." (emphasis added)[300]

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[299] Section 102 of Title I (20 U.S.C. 241(b)).

[300] Section 103(a)(2) of Title I (20 U.S.C. 241c(a)(2)); 45 C.F.R. §116.3(a), (b)(1975); See 45 C.F.R. §116a.4(1976). The 1974 Amendments (P.L. 93-380) established the following formula: (Section 103(a)(2)) (1) the "state per pupil expenditure figure" is calculated by multiplying actual state

[footnote continues]

The Title I statute includes the proviso "where satisfactory data ... are available" because low-income data are available for the entire nation only at the county level. Thus, when the county and the school system's boundaries are coterminous, the entitlement is determined directly by the Commissioner through the National Center of Education Statistics. However, where the LEA's boundaries are not coterminous with the county's boundaries, the SEA is delegated the responsibility of allocating grants among the LEAs in the county. This process is referred to as sub-allocation or sub-county allocation.

More specifically, the SEA must sub-allocate the county grants among eligible LEAs based on criteria prescribed by the Commissioner and set out in the Title I regulations.[301]

Under the regulations, funds from the county aggregate amount must be sub-allocated among the county LEAs based on

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[footnote continued from previous page]
per pupil expenditure by 40%, and the per pupil expenditure level for any state is limited to a range between 80% and 120% of the national average; (2) figure (1) is multiplied by the "children from low-income families" figure, which is determined by the "Orshansky index" (which adjusts the poverty level index of the census report according to family size and farm/non-farm location) and two-thirds of the children from families receiving AFDC payments; (3) this final figure results from multiplying (1) and (2). Because of weightings in the formula, more aid is provided to states with a high proportion of families below the "Orshansky index" of poverty, and less aid to urban areas where AFDC payments often put families above the "Orshansky index" than under the previous Title I formula.

[301] Section 103(a)(2) of Title I (20 U.S.C. 241c(a)(2)); 45 C.F.R. §116.4 (1975). See 45 C.F.R. §116a.4(1976).

the proportion of children living in institutions for neglected or delinquent children; and on the basis of available data which best reflects the current distribution of children from low-income families, including children from families receiving AFDC.[302] AFDC data alone must be used if it reflects the current distribution of low-income children.[303] Otherwise, the SEA may combine AFDC with other data on a weighted basis as deemed appropriate for determining the number of low-income children.[304]

The above determinations can be modified if a school district's allocation, as determined by the above figures, would be less than 85 percent of its allocation for the preceding fiscal year, then the allocation for that district must be raised to 85 percent by proportionately reducing the allocations of the remaining LEAs.[305] This provision is commonly referred to as the "hold harmless provision".

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[302] 45 C.F.R. §116.4(a) and (b)(1975). See 45 C.F.R. §116a.5(a) and (b)(1976).

[303] 45 C.F.R. §116.4(c)(1975). See 45 C.F.R. §116a.5(a) and (c)(1976).

[304] 45 C.F.R. §116.4(d)(1975). See 45 C.F.R. §116a.5(c)(1976) which requires OE approval for the use of sources other than census and AFDC data.

[305] Section 144 of Title I (20 U.S.C. 241h).

Once state entitlements are determined, the Commissioner must pay each state the amount which it is eligible to receive under Title I.[306] Where the sums appropriated by Congress are not sufficient to meet the total state entitlements as determined by the Commissioner,[307] the amounts which states are eligible to receive are determined by ratable reduction to the extent necessary.[308] However, no payments may be made to a state which has taken into consideration payments under Title I in determining the eligibility of an LEA in that state for state aid.[309]

From the funds paid to it under the above paragraphs, each SEA then distributes to each eligible LEA of the state, which has submitted an application approved by the SEA, the amount for which such application has been approved not to exceed the amount of the LEA's entitlement.[310]

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[306] Section 143(a)(1) of Title I (20 U.S.C. 241g(a)(1)); 45 C.F.R. §116.41(b)(1975). See 45 C.F.R. §116.17(1976).

[307] This has consistently been the case.

[308] Section 144 of Title I (20 U.S.C. 241h); 45 C.F.R. §116.9(1975). See 45 C.F.R. §116a.9(1976).

[309] Section 143(c)(1) of Title I (20 U.S.C. 241g(c)(1)); 45 C.F.R. §116.44 (1975). See 45 C.F.R. §116.18(1976).

[310] Section 143(a)(2) of Title I (20 U.S.C. 241g(a)(2)). Before an LEA application may be disapproved, the SEA must provide notice and opportunity for a hearing. Section 142(b) of Title I (20 U.S.C. 241f(b)); 45 C.F.R. §116.34(c). See 45 C.F.R. §116.5(c) and (d)(1976) which further requires notice of the reasons for disapproval; a hearing within 30 days of request; and a right of appeal to the Commissioner.

In addition to this initial grant distribution, the SEA is responsible for reallocating unused Title I funds, e.g., where a school district has not submitted an application. The reallocation of such funds must be made to those LEAs which have the greatest need, due to inequities inherent in a hardship caused by the Title I funding formula as the result of such circumstances as population shifts or changing economic conditions.[311]

Grant allocation is strictly limited to the above described methods.[312]

B. Organization of the Chapter

This chapter will discuss four aspects of the grant distribution process: OE distribution of aggregate grants to the SEA; general standards for SEA distribution of grants to LEAs; the 85 percent hold harmless provision; and reallocation of unused funds by the SEA.

C. Major Issues, Findings, Conclusions and Recommendations

The federal legal framework concerning both OE and SEA grant distribution standards is, for the most part, specific and precise. The statute sets out a step-by-step formula which must be followed. As a result, the grant distribution functions of both OE and the SEAs are susceptible to little, if any, interpretation or elaboration.

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[311] Section 144 of Title I (20 U.S.C. 241h); 45 C.F.R. §116.9 (1975). See 45 C.F.R. §116a.11(1976).

[312] Section 421A(c)(2)(B) of GEPA.

Where the statute has omitted specific standards in favor of OE promulgation of criteria or standards, OE has generally taken a similarly detailed approach. Thus, the SEA distribution formula specified in federal regulations by OE is also susceptible to little interpretation or elaboration, although under the regulations in existence during our interviews, the SEA may, for example, select the "best available data" for determining the number of low-income children in each LEA within the county.

Given the detailed scope and clear intent of the legal framework, our survey and analysis uncovered only two areas which merit revision. These are the application of the 85 percent "hold harmless" provision, and the standards for the reallocation of unused funds.

II. An Analysis of the Grant Distribution Process

A. OE Distribution of Aggregate Grants to the SEAs

1. The Federal Legal Framework

As mentioned previously, Section 102 of the Title I statute requires OE to

> make payments to State educational agencies for grants made on the basis of entitlements created under this title.

The statute goes on to specify the precise nature of those entitlements by indicating a formula for maximum grants to be followed by OE, namely:

> the aggregate of (A) the number of children aged five to seventeen, inclusive, in the school district of the local educational agency from families below the poverty level as determined under paragraph (2)(A) [from the most recent satisfactory census data], (b) two-thirds of the number of children aged five to seventeen, inclusive, in the school district of such agency from families above the poverty level as determined under paragraph (2)(B) [from AFDC data], and (c) the number of children aged five to seventeen, inclusive, in the school district of such agency living in institutions for neglected or delinquent children (other than such institutions operated by the United States) but not counted pursuant to section 123 for the purposes of a grant to a State agency, or being supported in foster homes with public funds. [Emphasis added.] [313]

multiplied by

> 40 percentum of the amount determined under the next sentence. The amount determined under this sentence shall be the average per pupil expenditure in the State except that (A) if the average per pupil expenditure in the State is less than 80 percentum of the

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[313] Section 103(c)(1) of Title I (20 U.S.C. 241c(c)(1)). As indicated previously, "poverty level" is determined using the "Orshansky index".

> average per pupil expenditure in the United States, or (B) if the average per pupil expenditure in the State is more than 120 per centum of the average per pupil expenditure in the United States, such amount shall be 120 percentum of the average per pupil expenditure in the United States. [Emphasis added.] 314/

Where "satisfactory data" for the above computation is not available for each LEA,

> the grant for any local educational agency in a State shall be determined on the basis of the aggregate amount of such grants for all such agencies in the county or counties in which the school district of the particular agency is located, which aggregate amount shall be equal to the aggregate amount determined under the two preceding sentences for such county or counties. [Emphasis added.] 315/

This has emerged as the current OE practice, i.e., OE computes maximum aggregate grants at the county level ("county grants").

If Title I were fully funded by Congressional appropriations, OE responsibility would end with the determination of maximum aggregate grants. However, since Congress has never fully funded the Title I program, OE must implement an additional provision of the statute -- the ratable reduction of allocations. Section 144 provides in relevant part:

314/ Section 103(a)(2) of Title I (20 U.S.C. 241c(a)(2)).

315/ Id.

> If the remainder of such sums available . . . is not sufficient to pay in full the total amounts which all local educatioal agencies are entitled to receive under part A of this title for such year, the allocations to such agencies and allocations under part B _shall_ . . . _be ratably reduced to the extent necessary_ to bring the aggregate of such allocations within the limits of the amount so appropriated . . . [Emphasis added.][316]

It is this ratably reduced amount that OE distributes to the states, provided that the state has complied with the Title I requirements, i.e., the state has not taken into consideration payments under Title I in determining the eligibility of an LEA in that state for state aid.[317]

2. Policy Analysis and Conclusions

The legal framework described above provides clear-cut standards for OE Title I grant determinations. Generally speaking, the statutory standards have been incorporated _in toto_ into the federal regulations.[318] No changes or elaborations have been made by OE in the federal regulations, since the legal framework would admit none, i.e., the

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[316] _See also_ 45 C.F.R. §116a.9(1976).

[317] Section 143(c)(1) of Title I (20 U.S.C. 241g(c)(1)); 45 C.F.R. §116.44(1975). _See_ 45 C.F.R. §116.18(1976).

[318] _See_, e.g., 45 C.F.R. §116.3, §116.6, §116.9(1975). However, the formula indicated in 45 C.F.R. §116.3 has now been outdated by the provisions of the 1974 Amendments (the formula described above). The revised regulations merely reference OE actions to the statutory formula of Section 103 of Title I (20 U.S.C. 241e) and do not repeat its provisions. _See_ 45 C.F.R. §116a.5(1976).

Congressional intent regarding aggregate grant distribution is clearly specified in the statute itself.

B. General Standards for SEA Distribution of Grants to LEAs

1. Introduction

Unlike OE distribution of grants to the SEAs, SEA grant distribution to the LEAs is not specifically described in the Title I statute. Instead, Section 103(a)(2) merely indicates that county grants should be distributed

> among those agencies upon such equitable basis as may be determined by the State educational agency in accordance with basic criteria prescribed by the Commissioner. [Emphasis added.]

Nevertheless, as Congress has done with OE distribution to the SEAs, OE has specified in federal regulations the standards to be applied by the SEA in sub-allocating the aggregate county grants for distribution to the individual LEAs.

2. The Federal Legal Framework

Where there is more than one LEA included in a county, the SEA must allocate county grant amounts to the individual LEAs which have submitted approved applications[319] based on the following formula:

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[319] *See* note 301 *supra*. *See* 45 C.F.R. §116.5(c) and (d)(1976) of the revised regulations which provides the following prior to SEA disapproval of an application:

> (c) Notice and opportunity for hearing. The State educational agency shall

[footnote continues]

> (a) To the extent that a county aggregate maximum grant is based on children aged 5 to 17, inclusive, living in institutions for neglected or delinquent children the county aggregate maximum grant shall be allocated among those local educational agencies in whose districts those institutions are located on the basis of the number of such children living in those institutions.
> (b) The remainder of the county aggregate maximum grant shall be allocated by the State educational agency among the several local educational agencies whose school districts lie within the county as provided in paragraphs (c)

[footnote continued from previous page]

> not finally disapprove any application in whole or in part without first affording the applicant agency reasonable notice and opportunity for a hearing with respect to such action in accordance with the requirements of section 425 of the General Education Provisions Act. Such notice shall include the reasons for the proposed disapproval. A hearing shall be held by the State agency 30 days after it receives a request from the applicant agency. If the State educational agency decides not to rescind its final action, it shall give notice of the decision to the applicant agency in writing, stating its reasons and indicating the right to appeal to the Commissioner within twenty days of the receipt of the notice.
> (d) Appeal. An applicant agency aggrieved by the final action of a State educational agency shall be given the opportunity for an appeal to the Commissioner as set forth in section 425 of the General Education Provisions Act.

> and (d) *on the basis of those available data which it deems best to reflect the current distribution in the county of children* aged 5 to 17, inclusive, *from low-income families, including families receiving payments under the program of aid to families with dependent children* under a State plan approved under Title IV of the Social Security Act, without regard to the amount of such payments and children in foster homes. 320/ [Emphasis added.]

In other words, the amount of the sub-allocation to LEAs must be based primarily upon the proportionate distribution of low-income children inthe LEA.

The regulations also specify the kinds of data which "may best reflect" the distribution of low income children. First, if AFDC data is deemed by the state to reflect current distribution of children from low-income families, the allocation among LEAs with regard to the "low-income" determination must be made solely on the basis of that data:

> (c) If the State educational agency has available data showing the distribution among the several school districts in the county of the children aged 5 to 17, inclusive, from families receiving any aid for dependent children and, if it deems that such data reflect the current distribution in the county of all children aged 5 to 17, inclusive, from low-income

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320/ 45 C.F.R. §116.4(a) and (b)(1975). See 45 C.F.R. §116a.5 (a)(b) and (c)(1976).

> families and in foster homes, then the allocation among local educational agencies of such remainder of the county aggregate maximum grant shall be made solely on the basis of such data.[321]

However if AFDC data does not reflect durrent distribution, the SEA has two options:

> then the State educational agency may combine those data with *other available data on such weighted basis as it deems appropriate* and best to reflect the current distribution in the county of such children or *use such other method as it deems appropriate* for that purpose [Emphasis added.] [322]

Additionally, the regulations specify the procedures to be used when the grant distribution formula is applied to LEAs located in more than one county --

> The allocation to a local educational agency pursuant to §116.4 shall be made separately for each county in which a part of the school district served by that local educational agency is located. The maximum grant for such a local educational agency shall be *the sum of its allocations from county aggregate maximum grants.*[323] [Emphasis added.]

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[321] 45 C.F.R. §116.4(c)(1975).

[322] 45 C.F.R. §116.4(d). This has been changed under the revised regulations. *See* 45 C.F.R. §116a.5(1976). *See* discussion *infra*.

[323] 45 C.F.R. §116.6(1975). The provision in the revised regulations is virtually identical. *See* 45 C.F.R. §116a.6 (1976). The regulation was promulgated pursuant to express OE authority under Section 103(b)(3) of Title I (20 U.S.C. 241c(b)(3)).

and LEAs in overlapping jurisdictions or serving children from another school district --

> In any case which two or more local educational agencies (other than State agencies directly responsible for providing free public education for handicapped children or for children in institutions for neglected or delinquent children) have responsibility for different groups of children in a district, or serve school districts which overlap, or in any case in which a local educational agency provides free public education for a substantial number of children residing in the school district of another local educational agency, the State educational agency may allocate the amount of the maximum grants among such local educational agencies in such manner as it determines will best carry out the purposes for which the grants under Title I of the Act are respectively made available. 324/ [Emphasis added.]

The former requires no discretion on the part of the SEA. The latter requires a discretionary determination of the "manner as . . . will best carry out the purposes" of Title I.

In sum, the federal regulations specify both the formula that the SEAs must apply in the allocation of Title I grants to individual LEAs as well as the general data sources which must be applied in the computation. They also provide guidance concerning particular fact situations to which the formula

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324/ 45 C.F.R. §116.5(1975). The provision in the revised regulations is virtually identical. See 45 C.F.R. §116a.7(1976). The regulation was promulgated pursuant to express OE authority under Section 103(b)(3) of Title I (20 U.S.C. 241c(b)(3)).

must be applied.

3. The State Legal Framework

Since the federal legal framework described above sets out the specific formula for the sub-allocation of county aggregate grants, there is virtually no separate state framework dealing with the allocation formula. In fact, in those states where LEA and county lines are coterminous, there is actually no role for the SEA at all in grant allocation; the county aggregate amount determined by OE is identical to the LEA grant distributed by the SEA.

However, there is an amount of SEA discretion as to what constitutes "the best available data" for use in the formula. As a result, states have adopted varying practices in this regard, e.g., they use census data, AFDC data, etc.

States have also developed policies in response to their discretion in the case of LEAs in overlapping jurisdictions or serving children from other school districts. For example, some states surveyed routinely adjust their figures for eligible children in each school district by adding those children coming from other school districts and subtracting those children who attend school in other districts. Clearly, this method of determination is consistent with the language of the regulation requiring the "best" manner of allocation.

4. Policy Analysis and Conclusions

As with the OE distribution formula specified by Congress, the SEA distribution formula specified by OE provides clear-cut standards which are not susceptible to further SEA interpretation or elaboration. The primary discretion which the SEA possesses as to grant distribution computations is its determination about what constitutes the "best available data" regarding the numbers of low income children.

However, even this discretion has been eliminated under the revised regulations. 45 C.F.R. §116a.5(c)(1976) now provides:

> The following are considered acceptable types of data:
> (1) 1970 census data on the number of children from low-income families, and
> (2) data on children in families receiving payments under the program of aid to families with dependent children under a State plan approved under Title IV of the Social Security Act and foster children. Other types of data must be approved by the Commissioner before use by the State educational agency.

Thus, the SEA is no longer able to use other data sources "as it deems appropriate" or "use such other method as it deems appropriate," (although such alternate data sources may be used by the SEA subject to OE approval). As a result, almost no discretion remains with the SEA in applying the general standards for grant distribution to individual LEAs.

Of course, the SEA retains the authority to determine the best manner of allocation consistent with the purposes of Title I grants for LEAs in overlapping jurisdictions or serving children from other school districts. But such authority is more discretionary on its face than in actual practice, since, as our previous example has indicated, this determination will generally involve only mathematical adjustments based on the actual distribution of children attending school in the LEA.

C. The 85 Percent Hold Harmless Provision

1. Introduction

The general grant distribution formula described above may be modified by the SEA in one instance -- where the 85 percent "hold harmless" provision applies.[325]

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[325] 45 C.F.R. §116.4(f)(1975) indicated another possible modification which has been eliminated under the revised regulations. The section provides:

> If the allocation of entitlement to a maximum grant to a local educational agency as otherwise computed pursuant to this section would, without regard to any pro rata reduction, reduce the entitlement of that agency to an amount which is less than its maximum grant for the previous year, the State educational agency may modify that allocation of entitlement to a maximum grant to the extent necessary to make an or-

[footnote continues]

2. The Federal Legal Framework

The Title I statute provides one modification to the general grant distribution standards in addition to "ratable reduction." Section 144 of Title I indicates that, where an LEA's ratably reduced allocation would be less than 85 percent of its allocation for the preceding fiscal year, that LEA must have its allocation raised to the 85 percent "floor" by reducing the allocation of the remaining LEAs. Specifically, the provision states:

> The allocation of a local educational agency which would be reduced under the preceding sentence to less than 85 per centum of its allocation under part A for the preceding fiscal year, shall be increased to such amount, the total of the increases thereby required being derived by proportionately reducing the allocations of the remaining local educational agencies, under the preceding sentence, but with such adjustments as may be necessary to prevent the allocation to any remaining local educational agency from being thereby reduced to less than 85 per

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[footnote continued from previous page]

> derly adjustment in the program of the local educational agency. [Emphasis added.]

It was intended to provide a gradual transition to lower funding in those cases where, e.g., a state data base was changed to more closely reflect current conditions and, under the new data base, some LEAs formerly funded would have their Title I funds dramatically reduced. Since data sources have now become more or less stabilized, the provision is no longer necessary. However, its effect was very similar to that of the "hold harmless" provision, despite the fact that it was addressed to different circumstances.

centum of its allocation for such year.[326]

Adjustments made under the 85 percent hold harmless provision are the responsibility of the SEA and are made in the course of the sub-allocation process.

3. State Legal Framework

At least one state in our survey has experienced some difficulty with the "hold harmless" provision. That state has indicated that although the general statutory language concerning grant distribution would seem to require that all modifications be made within the county based on the total amount of the county grant, the purpose of "hold harmless" is better served if adjustments to the LEA amount are made on a statewide basis.

The following example serves to illustrate the problem. Where hold harmless adjustments must be made within county rather than state limits, it is possible to have an LEA with an increase in Title I formula children in the same county with an LEA with a declining Title I population -- so that the first LEA would receive fewer Title I funds in order to raise the second LEA to the 85 percent floor. As a result, the first LEA with the rising population would be disadvantaged, despite its need.[327]

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[326] "Hold harmless" was originally included in the Title I appropriation acts, 1967-1972, and was initially applicable only to grants to the SEA. It was also made applicable to the LEAs under the appropriations act for 1974 as a 90 percent "floor" prior to its incorporation into the Title I statute as an 85 percent "floor."

On the other hand, if "hold harmless" is read to cover all LEAs statewide, the amounts needed to raise LEAs to the 85 percent floor would be taken in equitably from LEAs throughout the state, thus minimizing the disadvantage to any one LEA.

The state included in our survey has indicated two possible methods of accomplishing the statewide distribution:

(1) The allocations of those LEAs which are coterminous with counties are subtracted from the total state grant. The statewide number of Title I formula children is divided into the remaining state grant to arrive at a per-pupil grant. The LEA grant is then computed as either the 85 percent floor figure or as the adjusted per-pupil amount, whichever is greater.

(2) The LEA grant is computed as above, but without first subtracting those grants which go to coterminous LEAs/counties.

Further, the state has submitted a study to OE which shows the differences in result from county level and state level adjustment.

This issue has been addressed in a 1974 staff memorandum from the Office of the General Counsel at HEW

327/ This was the situation in Huntsville City Board v. Brown, 379 F. Supp. 1092 (M.D. Ala. 1974) which upheld the constitutionality of the 90% "hold harmless" provision in the 1974 appropriation act.

entitled, "Title I, ESEA allocation of funds to local educational agencies -- Issues Raised by State of . . ." In that memorandum, the Office of the General Counsel concluded that statewide modifications under the hold harmless provision could not be sanctioned under the statute; further, that despite the perhaps "better" results achieved under the statewide allocation methods, those methods conflict with express statutory language concerning county grants.

These conclusions were reached after consideration of the Conference Report on P.L. 93-380, which added the 85 percent hold harmless provision. That report expressed concern with OE's practice of county, rather than LEA, allocation procedures, and indicated the Congressional intent that

> the 85 percent hold harmless provisions serve as an incentive to the Office of Education to collect appropriate local educational agency-level data necessary to implement the Amendments. 328/

In sum, the memorandum found that proper resolution of the matter would be through statutory amendment:

> Under these circumstances, we cannot say that the . . . method is authorized by the Title I statute or clearly consistent with it. On the other hand, we recognize that with respect to the application of the LEA

328/ Sen. Rept. No. 93-1211, 93rd Cong. 2d. Sess., (1974), 147.

> floor provisions in the Act the . . . method may achieve results that may be more in keeping with the objectives of the conference committee on P.L. 93-380 than that obtained under the current method of distribution. *At the heart of the problem are the internal inconsistencies in the statute itself* (compare §103(a)(2) which speaks in terms of "county" grants and §144 which provides an 85 percent "floor" on an LEA basis). *It would appear that in view of the uncertainty and confusion regarding this matter, the best avenue for resolution lies in a technical or other amendment to the legislation.* [At 9-10, emphasis added.]

4. Policy Analysis and Conclusions

The Title I language concerning hold harmless is not sufficiently clear. As quoted *infra*., Section 144 requires an 85 percent floor, with a proportionate reduction from the allocations of "the remaining local educational agencies." The Title I statute would seem to require the redefinition of the quoted phrase to read "the remaining local educational agencies in the county," based on the current OE practice of county grants. However, Congressional intent to distribute Title I funds to LEAs more equitably would seem to support a statewide approach.

In order to remedy this situation, we recommend that the Title I statute be amended to permit adjustments based on the hold harmless provision to be made from LEA allocations statewide. This would not only remedy the apparent technical inconsistencies in the statute, but would be in furtherance of the Title I intent by permitting the distribution of grant funds in those LEAs where they are most needed.

D. Reallocation

1. Introduction

Once Title I grant funds are distributed to LEAs by the SEAs, unused funds may be reallocated[329/] by the SEA. Funds for reallocation are generally of two sorts: those unused because an LEA has not filed an application for available funds; and those not used by an LEA.

2. The Federal Legal Framework

The Title I statute expressly provides for the reallocation of unused funds to LEAs meeting certain conditions:

[329/] Reallocation is distinguishable from "carryover." "Carryover" involves unused LEA funds which are carried over to the same LEA's budget for the next consecutive fiscal year. Reallocation, on the other hand, involves unused LEA funds which are returned to the SEA for redistribution to other LEAs.

> If the maximum grant a local educational agency or an agency referred to in section 122 would receive (after any ratable reduction which may have been required under the first sentence of this section) is more than an amount which the State educational agency determines, in accordance with regulations prescribed by the Commissioner, such agency will use, the excess amount shall be made available first to educational agencies in that State. Determinations of the educational agencies to which such excess amounts shall be made available shall be made by the State educational agency in furtherance of the purposes of this title in accordance with criteria prescribed by the Commissioner which are designed to assure *that such excess amounts will be made available to other eligible educational agencies with the greatest need for the purpose of, where appropriate, redressing inequities inherent in, or mitigating hardships caused by, the application of the provisions of paragraph (2) of section 103(a) as a result of such factors as population shifts and changing economic circumstances*. In the event excess amounts remain after carrying out the preceding two sentences of this section, such excess amounts shall be distributed among the other States as the Commissioner shall prescribe for use by local educational agencies in such States for the purposes of this title in such manner as the respective State educational agencies shall prescribe. 330/
> [Emphasis added.]

330/ Section 144 of Title I (20 U.S.C. 241h); 45 C.F.R. §116.9 (b)(1975). *See* 45 C.F.R. §116a.11(1976).

In other words, reallocation must be made first by the SEA to other LEAs within the state which have the greatest need as the result of inequities in and hardships caused by the Title I formula, e.g., population shifts, changing economic conditions; then by OE to other states. An LEA's total allocation including reallocated funds may not, however, exceed its maximum entitlement.

The statutory standard for reallocation has been incorporated into the regulations in order to provide the "criteria prescribed by the Commissioner" contemplated by the statute.[331/]

3. The State Legal Framework

Many states included in our survey rarely, if ever, have cause to reallocate funds, since in those states funds are rarely unused. Most of those states which do have occasion to reallocate funds indicated no problems with the federal legal framework.

Only one state surveyed has established independent standards interpreting the Title I statute and regulations. That state reallocates funds among those LEAs whose final

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[331/] 45 C.F.R. §116.9(b)(1975).

allocation was less than 90% of its previous year's allocation and that also had 40 or more eligible children.

4. Policy Analysis and Recommendation

Few states indicated difficulty with the reallocation procedure or standards. Nevertheless, state compliance with the federal standard -- LEAs with the greatest need for additional funds in order to redress inequities and mitigate hardships caused by disparities between the Title I formula and actual needs -- can not be readily assessed. This is the case especially because of the lack of specificity in the "criteria" set out in the regulations.

For example, the state policy above, which authorizes reallocation of funds to LEAs funded at less than 90% of a previous year's allocation, appears to be inconsistent with the reallocation language of the statute. Instead of addressing itself to disparities between the Title I formula and actual needs, caused by such factors as population shifts and changed economic circumstances, the policy attempts to impose a widespread extension of the hold harmless provision without an independent examination of the factors set out in the statute. In other words, an LEA receiving less than 90% of a previous allocation is not necessarily an LEA in greatest need under the statutory standard, although it may be.

Therefore, we recommend that OE adopt new regulations which do more than set out the language of the statute. These regulations should include more specific criteria and illustrative examples for guiding state reallocation decisions, in keeping with the statutory intent. Such a change should eliminate the state policy problem described above, as it appears to result from a misunderstanding of the intent of the reallocation provision.

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SEA ENFORCEMENT

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CHAPTER 6
SEA ENFORCEMENT

I. Introduction

This introduction to the enforcement chapter contains (1) an overview of the federal legal framework for SEA enforcement; (2) a discussion of the organization of this chapter; and (3) major issues, findings, conclusions, and recommendations contained in the chapter.

A. Overview of the Federal Legal Framework

The overview of the federal legal framework for SEA enforcement includes (1) the purpose and importance of the function, and (2) the federal legal framework for SEA enforcement.

1. The Purpose and Importance of the Function

SEA "enforcement" in its broadest sense means requiring compliance with Title I requirements through activities that could range from private negotiations to formal administrative hearings. For example, enforcement could occur when reviewing LEA applications, monitoring Title I projects, resolving audit exceptions or recommendations, requiring compliance with comparability, or at other points in the Title I program cycle.

For purposes of this paper, the term "enforcement" includes the actual use of formal or informal sanctions once it has been determined that a LEA was or is not acting in a manner consistent with the relevant Title I requirements.

The importance of SEA enforcement is obvious. Congress intended that Title I be a supplemental categorical aid program. Under the Title I legal framework, the SEA is required to enforce Title I requirements. If the state fails to perform its enforcement responsibilities in a manner that conforms to the requirements of Title I, then it may be acting contrary to law and may also be permitting LEAs to do the same. The consequences of failing to enforce may include costly audit exceptions; requests that illegal expenditures be repaid; adverse rulings by the Title I Audit Hearing Board; withholding of funds; or even litigation aimed at insuring lawful compliance with Title I requirements.

2. The Federal Legal Framework

a. Introduction -- This overview of the federal legal framework for SEA enforcement includes a discussion of (1) the requirement for SEA enforcement; (2) general provisions related to SEA enforcement; (3) SEA authority to recoup misspent funds;

(4) the SEA's authority to withhold or suspend; and

(5) the statute of limitations.

b. The Requirement for SEA Enforcement -- The Title I statute and regulations impose a clear obligation on SEAs to enforce Title I requirements. In its application to the Commissioner,[332] a state must give several assurances, among which are assurances related to SEA enforcement. The SEA must assure the Commissioner, in part, that

(1) The SEA will comply with the requirements imposed on it by the Title I statute and regulations.[333]

(2) Each LEA application which the SEA approves will comply with the program requirements set forth in the Title I statute, including the "enforcement of any obligations imposed upon a [LEA] under Section 141(a)".[334] (Emphasis added.)

(3) The SEA will require each LEA submitting an application to carry out all assurances given by it and to perform all obligations imposed upon it by the Title I statute and regulations.[335]

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[332] Sec. 142(a) of Title I (20 U.S.C. 241f(a)). See also §434 of GEPA (20 U.S.C. 1232c).

[333] Sec. 142(a)(1) of Title I (20 U.S.C. 241f(a)(1)); 45 C.F.R. §116.31(c)(1975). See 45 C.F.R. §116.3(a) (1976).

[334] Id.

[335] Id.

(4) The SEA will adopt fiscal control and fund accounting procedures to assure the proper disbursement of, and accounting for, Title I funds.[336]

Without these assurances, the SEA is out of compliance. Therefore, no SEA can comply with these assurances unless it insures that Title I requirements are enforced.

c. General Provisions Related to SEA Enforcement -- Although Title I requires SEAs to enforce Title I requirements, there is no separate section in the GEPA or Title I statute or regulations that is labeled "SEA enforcement". However, to the extent that enforcement is related to other SEA functions, e.g., application approval, monitoring, auditing, the federal legal framework indirectly provides for enforcement. For example, in the application approval stage, SEAs can enforce Title I requirements by delaying or finally refusing the approval of applications that do not "effectively meet" the program requirements set forth in Section 141(a) of Title I or do not contain the assurances required by Title I regulations.[337] However, the Title I regulations in effect during the state interviews provided that the SEA may not finally disapprove an application in whole or in part without first affording the LEA submitting the application "reasonable notice and opportunity for a hearing with respect to such action."[338]

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[336] Section 142(a)(2) of Title I (20 U.S.C. 241f(a)(2)); 45 C.F.R. §116.31(d)(1975).

[337] 45 C.F.R. §116.34(a)(1975). See Chapter 1 SEA Approval of LEA Applications.

[338] 45 C.F.R. §116.34(c); See 45 C.F.R. §116.5(c)(1976).

These regulations must be read together with the requirements of the GEPA statute which provide for a formal hearing by the SEA, and review by the Commissioner. With respect to the SEA hearing provision, the statute defines who may request a hearing and what must be alleged. The statute provides, in part, that

> any applicant or recipient aggrieved by the final action of the [SEA] and alleging a violation of State or Federal law; rules, regulations, or guidelines governing the applicable program, in (1) disapproving or failing to approve its application or program in whole or part, (2) failing to provide funds in amounts in accord with the requirements of laws and regulations, or (3) terminating further assistance for an approved program, may within thirty days request a hearing. 339 /

The statute further provides that within thirty days after the SEA receives the request for a hearing, it

> shall hold a hearing on the record and shall review such final action. No later than ten days after the hearing, the [SEA] shall issue its written ruling, including reasons therefor. If it determines such final action was contrary to Federal or State law, or the rules, regulations, and guidelines, governing such applicable program it shall rescind such final action. 340 /

339/ Sec. 425 (a) of GEPA (20 U.S.C. 1231b-2).

340/ *Id*.

In addition, the role of the Commissioner in reviewing SEA decisions must be considered because the Commissioner can issue certain orders pending appeal and final orders concerning the SEA's decision. Thus, if the applicant or recipient is aggrieved by the SEA's failure to rescind its final action after the SEA hearing, then an appeal may be taken to the Commissioner only if "notice of such appeal is filed with the Commissioner within twenty days after the applicant or recipient has been notified"[341] by the SEA of the results of the hearing.

The statute also provides that if the Commissioner determines on appeal that the final action of the SEA was contrary to federal law, or the rules, regulations, or guidelines for the program, then the Commissioner

> shall issue an order to the [SEA] prescribing appropriate action to be taken by such agency. On such appeal, findings of fact of the [SEA], if supported by substantial evidence, shall be final. The Commissioner may also issue such interim orders to [SEAs] as he may deem necessary and appropriate pending appeal or review.[342]

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[341] Sec. 425(b) of GEPA. (20 U.S.C. 1231b-2).

[342] *Id*. The Commissioner also has authority to "forthwith terminate all assistance" to the SEA if the SEA fails or refuses to comply with any provision of Sec. 425 of GEPA or with any order of the Commissioner issued under Sec. 425(b) of GEPA. Sec. 425(d) of GEPA (20 U.S.C. 1231b-2).

Thus, the SEA can enforce Title I requirements during application approval, but final disapproval of a LEA application involves reasonable notice and a hearing and a possible appeal to the Commissioner.

In the monitoring phase of program operations, the SEA is required by the GEPA regulations to

> constantly monitor performance under federally-supported activities to assure that adequate progress is being made towards achieving the goals of the grant. This review shall be made for each function or activity of each grant as set forth in the approved state plan or application. [343]

Thus, the SEA can use its oversight responsibility to identify non-complying practices, to order that they be corrected, to request an audit if it appears necessary; or to initiate or recommend further enforcement action.

The auditing requirements set forth in the GEPA regulations impose a clear requirement that the scope of SEA audits must include both fiscal and enforcement considerations. With respect to fiscal and compliance matters, the regulations state that audits must determine, at a minimum,

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[343] 45 C.F.R. §100b.431(1975). See pp. 368-375 infra, for a discussion of the relationship between monitoring and enforcement; see also Chapter 4, Monitoring, and the OE handbook entitled Title I ESEA: Conducting On-Site Visits.

> . . . the fiscal integrity of . . .
> financial transactions and reports and the
> compliance with applicable statutes,
> regulations and terms and conditions
> of the grant or subgrant[344]

The regulations also require that such audits be scheduled with "reasonable frequency, usually annually, but not less frequently than once every two years . . ."[345]

With respect to the enforcement aspects of the auditing requirement, SEAs are also required by the same regulations to have a financial management system that provides for a "systematic method to assure timely and appropriate resolutions of audit findings and recommendations."[346] Auditing alone is not sufficient. There must be some "systematic method" of resolving the results of audits, including audit exceptions where a repayment of funds appears to be required by the audit findings. Other than this requirement for a "systematic method" of resolving the results of audits, the regulations provide no guidance or minimum standards for SEA audit resolution procedures.

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[344] 45 C.F.R. §100b.301(h)(1975). See §434(a) of GEPA (20 U.S.C. 1232c).

[345] Id. See Chapter 7, Financial Management.

[346] 45 C.F.R. §100b.301(i)(1975).

With respect to enforcement of the comparability requirements, the Title I regulations provide that, if a particular LEA fails to comply with the comparability requirements, the SEA is authorized to withhold the payment of Title I funds to the non-complying LEA, according to the procedures specified in the regulations.[347]

In short, it is clear that SEAs are required to enforce Title I requirements and that application approval, monitoring, audit resolution, or comparability withholding provide opportunities to do so. In addition, there are other provisions in the federal legal framework which, although not clearly labelled as "SEA enforcement" provisions, provide the SEA with authority to recoup misspent funds or to withhold or suspend funds.

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[347] 45 C.F.R. §116.26(k)(1975). See 45 C.F.R. §116a.26(f) (1976) new regulations which now governs SEA withholding of funds from LEAs which do not comply with comparability requirements. See also 45 C.F.R. §116a.26(n)(2) (1976) which requires the SEA to report comparability reallocations or withholding to the Commissioner.

d. SEA Authority to Recoup Misspent Funds -- As interpreted by HEW, Office of General Counsel (OGC), the normal procedure used by the federal government to recoup misspent Title I funds is to indicate to the state involved that they must remit the amount indicated to OE for deposit as miscellaneous receipts of the U. S. Treasury.[348]

When this approach is not possible, the Commissioner may satisfy audit exceptions by withholding the amount owed from the state's next year's allocation.[349] If funds are withheld from any state's allocation because of an audit exception, OGC explains that while the payment to that state is being reduced on account of the debt to the U.S. (for misspending federal funds) its allocation remains unchanged.

> The state is, of course, responsible for approving projects of local educational agencies within the limits of the amounts of their entitlements established in accordance

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[348] HEW Memorandum from Harry J. Chernock, Assistant General Counsel for Education to Associate Commissioner for Elementary and Secondary Education entitled, "Settlement of Audit Exceptions in Title I, Elementary and Secondary Education Programs", (June 11, 1971). See §143(a)(1) of Title I (20 U.S.C. 241g(a)(1)); §435 of GEPA (20 U.S.C. 1232d); 45 C.F.R. §100b.53(1975).

[349] Id. However, if an audit exception is taken with regard to an expenditure under an appropriation before the time has expired for obligation under the carryover provision, §412(b) of GEPA (20 U.S.C. 1226(b)), OGC concludes that those funds would be available for re-obligation to be expended for legitimate Title I purposes.

> with Section 103 of the Act as ratably reduced pursuant to Section 144. The State would be paid for the aggregate amount of approved projects in the State less the amount withheld because of an audit exception. The difference between the aggregate amount and the amount paid to the State would have to be made up out of State and local funds . . . [Emphasis added.] 350/

The principles set forth above in the OGC memorandum quoted are equally applicable to the recoupment of misspent funds pursuant to an SEA audit. 45 C.F.R. §100b.53(1975), which explains the relevant federal policies with respect to the methods of payments of federal funds, including Title I, does not distinguish between federal and state audits:

> Each state agency and subgrantee, in its maintenance of expenditure accounts, records, and reports, shall promptly make any necessary adjustments in its records to reflect . . . overpayments resulting from Federal or State administrative reviews or audits or otherwise . . . [Emphasis added.]

350/ Id.

In sum, applying the principles set forth in the OGC memorandum, the normal procedure which an SEA may use to recoup misspent Title I funds is to indicate to the LEA that it must remit the amount indicated by the SEA. When this approach is not possible, the SEA may satisfy audit exceptions by withholding payment of a portion of the LEA's subsequent year's entitlement. In this case, the difference between the aggregate amount (i.e., the LEA's entitlement) and the amount paid to the LEA would have to be made up out of state and local funds. [351]

e. The SEA's Authority to Withhold or Suspend Funds -- Congress clearly intended that SEAs enforce Title I requirements. However, except for authority to withhold funds to require the remittance of misspent funds [352] and authority to withhold funds for comparability violations, [353] the federal legal framework does not directly and expressly address the authority of SEAs to withhold or suspend funds for other Title I violations.

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[351] See 45 C.F.R. §100b.301(h) and (i)(1975) which generally requires that SEAs undertake fiscal and compliance audits and that they develop systematic methods to assure timely and appropriate resolution of audit findings.

[352] As discussed supra, state and local funds must be committed in an amount equivalent to that withheld.

[353] 45 C.F.R. §116.26(k)(1975). See 45 C.F.R. §116a.26(f) (1976) which governs SEA withholding of funds from LEAs which do not comply with comparability requirements and 45 C.F.R. §116a.26(n)(2)(1976) which requires the SEA to report comparability reallocations or withholding to the Commissioner.

The Title I statute and regulations do expressly authorize the Commissioner to withhold funds -- or in his discretion to direct that a SEA shall withhold funds for non-compliance with Title I requirements.[354]

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[354] The statute provides that "whenever the Commissioner, after reasonable notice and, opportunity for a hearing to any [SEA], finds that there has been a failure to comply substantially with any assurance set forth in the application of that State . . . the Commissioner shall notify the agency that further payments will not be made to the State under [Title I of the Act] (or, in his discretion, that the [SEA] shall not make further payments under [Title I of the Act] to specified [LEAs] affected by the failure). Until he is so satisfied, no further payments [under Title I of the Act] shall be made to that State or payments by the [SEA] will be limited to payments to [LEAs] not affected by the failure as the case may be. (Section 146 of Title I (20 U.S.C. 241j); 45 C.F.R. §116.52(a)(1975). See 45 C.F.R. §116.20(a)(1976). Prior to initiating a hearing, the Commissioner is required to attempt to resolve apparent differences between OE and the SEA regarding the interpretation or application of any Title I program requirements. 45 C.F.R. §116.52(b)(1975). See 45 C.F.R. §116.20(c)(1976).

The GEPA statute also contains a general withholding provision which is, in part, comparable to the withholding provision set forth in Title I. In addition, this section of GEPA authorizes the Commissioner, at his discretion, to suspend payments to the SEA pending the outcome of any termination proceeding "after such recipient has been given reasonable notice and an oppotrunity to show cause why such action should not be taken."[355]

Under the express authority granted SEAs to enforce Title I requirements imposed upon LEAs by §141(a) of Title I, it can be argued that SEAs have implied authority to withhold or suspend funds for non-compliance with Title I requirements.

In addition, the GEPA statute implies, in part, that Congress contemplated the withholding or suspension of funds by SEAs. The section of the GEPA statute governing review of applications includes "failing to provide funds in amounts in accord with the requirements of laws and regulations"[356] and "terminating further assistance for an approved program"[357] as reasons why an applicant or recipient aggrieved by the final action of the [SEA] and alleging a violation of state or federal law, rules, regulations, or guidelines . . ."[358] may request a formal hearing at the SEA. (Emphasis added.) We interpret these provisions to mean that Congress contemplated that SEAs could withhold or suspend funding for an approved application and that the LEA could appeal such a decision to the SEA. Although the statute does not define the term "termination", we construe it to include both permanent termination and temporary termination, i.e., a final cut-off of funds or a temporary cut-off of funds.

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[355] Sec. 434(c) of GEPA (20 U.S.C. 1232c). See 45 C.F.R. §116.20(b)(1976). The GEPA regulations clarify that certain actions by the Commissioner do not waive his/her right to withhold for non-compliance. The regulations state that, "The approval of a State plan or State application, the approval of a grant, or the entering into of a contract or other arrangement, and any payment pursuant thereto, shall not be deemed to waive the right of the Commissioner to withhold funds by reason of the failure of the recipient to observe, either before or after such administrative action, any Federal requirements. 45 C.F.R. §100b.482(1975).

[356] Sec. 425(a) of GEPA (20 U.S.C. 1231 b-2).

In sum, SEA authority to withhold or suspend funds for non-compliance with Title I requirements is neither direct nor express. To a large extent, SEA authority to withhold or suspend funds is implied authority.

f. The Statute of Limitations -- In the Education Amendments of 1974, Congress passed a statute of limitations provision that has implications for enforcement of Title I requirements through audit resolution procedures. The statute reads as follows:

> No state or local educational agency shall be liable to refund any payment made to such agency under this Act (including Title I of this Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such

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[357] Id.

[358] Id.

> agency received final written notice that such payment was unauthorized. 359/

This statute of limitations originated in the House Committee on Education and Labor, and was agreed to by the Senate in Conference. The report of the House Committee indicated that the provision was intended to

> . . . lead to better administration of ESEA Programs. It will encourage HEW to make audits more promptly than has been the case. It will also remove the threat hanging over the heads of school administrators that some day, some time they may be forced to make repayments of expenditures made many years before. The Committee has been impressed by the need for this amendment from the recent experiences of many states with Title I audits. 360/

The critical point in the operation of the statute of limitations is, as the provision states, when "final written notice" is given by the federal government. The Committee report is clear on this point.

> The Committee intends 'final written notice' to be that notice which is given after the State or local agency has been notified of the audit exception by HEW and after the Office of Education has determined that it does intend to collect on that audit exception. 361 /

359/ Sec. 804 of Title VIII, ESEA (20 U.S.C. 884).

360/ H.R. Rep. No. 93-805, 93d Cong. 2d Sess., 79(1974).

361/ *Id.*

The Committee report then details a precise understanding of how the audit process operated and points out that "final written notice" does not mean the final copy of the HEW Audit Agency report, the response of the SEA to that report, the preliminary audit determination sent by OE to the state, nor any further correspondence between OE and the SEA concerning possible exceptions prior to the final determination notice in which the federal government asks for repayment of funds. This last letter must be received within five years of payment of the questioned funds if it is to have effect.

The statute of limitations was intended to have retroactive effect. The House Committee report contains a statement of retroactive intent

> In other words, if the Office of Education on December 31, 1973 sent a final determination letter for a Title I program to a State for programs funded during fiscal year 1968, OE will not be able to collect on any alleged unauthorized uses of these fiscal 1968 funds under this amendment. The State would have received its payment for fiscal year 1968 by June 30, 1968, which is more than five years before the final determination letter has been sent. 362/

In correspondence with an LEA, OE concluded that it would be reasonable to construe the statute of limitations provision as applying with equal force and effect to unauthorized expenditures disclosed by state audits.

362/ Id.

B. Organization of this Chapter

Part I of this Chapter has set forth an overview of the federal legal framework for SEA enforcement of Title I requirements.

Part II of this chapter describes and analyzes the federal and state legal frameworks for the major SEA enforcement strategies and sanctions. For analytic purposes Part II has been divided into several sections, including (1) SEA final approval or delayed approval of LEA applications; (2) SEA audit resolution procedures and audit exceptions; (3) SEA authority to recoup misspent funds; (4) SEA withholding or suspension of funds; (5) the relationship between SEA monitoring and enforcement and (6) the applicability of the statute of limitations to SEA audits.

C. Major Issues, Findings, Conclusions, and Recommendations

The Legal Standards Project has made several recommendations for amendments to the federal legal framework for SEA enforcement of Title I requirements. Set forth below is a summary of our major findings and the recommendations developed as a result of these findings.

With respect to our general findings about the federal legal framework for SEA enforcement, we found that the federal legal framework for SEA enforcement is not organized to facilitate SEA enforcement, i.e., enforcement related provisions are scattered throughout the statutes and regulations and there is no separate and distinct section labeled "SEA enforcement". In addition, the nature and extent of SEA enforcement authority is not set forth clearly in the federal legal framework.

In general, the state legal framework for SEA enforcement appears to reflect these problems found in the federal legal framework. SEA uncertainty about the nature and scope of SEA enforcement authority has generally produced widely varying SEA enforcement policies.

Accordingly, we recommend that the Title I regulations be amended to provide a separate section for SEA enforcement. This section should incorporate by reference the requirement that SEAs enforce Title I requirements and should incorporate by reference the enforcement related provisions scattered throughout the federal legal framework. This would serve at least two purposes. It would emphasize SEA enforcement as a SEA function and would provide a list in one place of all enforcement related provisions and the authority for them.

As for more specific findings, we found, first, with respect to SEA final disapproval or delayed approval of LEA applications as a means of enforcing Title I, that SEAs indicated that delayed approval was frequently used to enforce Title I requirements. However, final disapproval appeared to be rarely, if ever, used. In addition, we found that the utility of application approval for enforcement purposes is related to the clarity with which LEA program requirements are set forth in the federal legal framework.[363]

We have recommended that, as an aid to enforcement, minimum standards be established for each Title I requirement about which a SEA must make a determination when reviewing a LEA application.[364]

363/ See Chapter 1, SEA Approval of LEA Applications, at pp. 158-164 for a discussion and recommendations about how the application approval process should be more closely related to the enforcement function.

364/ Recommendations for minimum standards for each LEA program requirement are set forth in An Analysis of the Basis For and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965, (September, 1977)

Second, with respect to audit resolution procedures, we found that most SEAs do not appear to have written procedures describing a "systematic method to assure timely and appropriate resolution of audit findings and recommendations."[365] We also found that the federal legal framework fails to provide any guidance or standards for such a "systematic method."

We have recommended that OE require SEAs to develop audit resolution procedures, which, at a minimum, shall contain

> (a) the identity of the SEA division, office or official responsible for making the post-audit determination that reimbursement will be requested for Title I misexpenditures revealed by a LEA or SEA audit;
>
> (b) a provision requiring that the SEA send to the LEA a final written determination ("final written notice") requesting reimbursement for sustained audit exceptions;
>
> (c) a deadline for final settlement of audit reports by the responsible SEA office or official;
>
> (d) a requirement that the responsible SEA office or official notify the audit office in writing when the audit has been settled and closed out;
>
> (e) a description of enforcement action that can be taken in the event reimbursement is not made by the date established by the SEA for such repayments.
>
> (f) procedures for audit appeal hearings or hearings to appeal the imposition of enforcement sanctions.

365/ 45 C.F.R. §100b.301(i)(1975).

Third, with respect to SEA recoupment of misspent funds, i.e., reducing future payments by the amount of past misexpenditures, we found that this was rarely, if ever, used. Two states indicated that, if necessary, they would use this sanction. We also found that the GEPA regulations which, as we have construed them, provide implied SEA authority for this enforcement sanction, do not incorporate an HEW interpretation that state and local funds must be spent, in an amount equal to that by which the payment was reduced, for Title I purposes. We found that the SEAs who reduced future payments by the amount of past misexpenditures do not appear to impose this requirement on LEAs.

Among other things, we have recommended that the GEPA regulations be amended to clarify SEA authority in this area and to incorporate the requirement that state and local funds must be committed for Title I purposes in an amount equal to that by which the payment was reduced for non-complying expenditures.

In addition, we have recommended that (a) OE determine the feasibility of an alternative procedure for resolving audit determinations by allowing equal amounts of state and local funds to be used for Title I in accordance with Title I requirements; such funds would be in addition to the regular allocation; and (b) if such an alternative procedure appears feasible, to seek statutory authorization for it.[366]

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[366] See pp. 354-357, infra.

Fourth, with respect to SEA authority for withholding or suspending funding to enforce Title I requirements, we found that the federal legal framework does not directly and expressly authorize SEAs to withhold or suspend funds to enforce Title I requirements. However, we also found that a reasonable basis exists for concluding that SEAs have implied authority to withhold or suspend Title I funds for enforcement purposes. The review of SEA written material and interviews with SEA Title I officials revealed that a wide variety of SEA policies exist with respect to SEA withholding and suspension. These policies range from, "I don't know what we would do" if a violation other than comparability were discovered after application approval to, "the SEA can withhold for any violation." Some SEAs indicated they had authority to withhold, but not to suspend funds with a loss during the interim. Others indicated they could withhold and suspend with loss of funds during the interim.

We have recommended, in part, that the Title I regulations be amended to make express what is implicit, i.e., authority for SEAs to withhold or suspend funds. We have also recommended that SEAs be required to develop and disseminate procedures governing withholding and suspension of funding. We have concluded that express authority is necessary because of the ambiguous nature of the implied authority for SEA withholding and suspension and because of widely varying SEA interpretations of this implied authority.

Fifth, with respect to the relationship between monitoring and enforcement, we found that some tension exists between the technical assistance and the compliance aspects of monitoring and enforcement, and that the federal legal framework does not adequately address the relationship between monitoring and enforcement. We also found that different SEAs appear to interpret their monitoring and enforcement responsibilities differently because of this lack of clarity in the federal legal framework.

We have recommended that the monitoring regulations be amended to impose certain SEA recordkeeping requirements that would have the effect of documenting what enforcement action was taken by a SEA when it discovered a Title I violation during an on-site monitoring visit.

Sixth, with respect to the applicability of the statute of limitations to SEA audits and audit determinations, we found that the question has arisen in only one of the ten states included in the study.

OE, in correspondence with the LEA, which had been audited by the SEA, explained that the statute of limitations did apply with equal force and effect to state audits. However, based on the facts of the case[367] OE found that the LEA had received "final written notice" within the five year period. Therefore, the LEA was required to repay the misspent Title I funds.

We have concluded that OE's interpretation may be construed as being consistent with the language contained in the statute. However, the legislative history "explaining" the provisions only makes reference to HEW audits and OE determinations.

We have recommended that the statute of limitations, to the extent it would not be in conflict with state law, be interpreted to apply to SEA audit exceptions and audit determinations.

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[367] See pp. 377-378, infra.

In short, the findings and recommendations discussed above are a summary of our major findings and recommendations for SEA enforcement. Additional findings and detailed recommendations for each of these areas are discussed in Part II of this chapter.

II. An Analysis of Major SEA Enforcement Strategies and Sanctions

A. Introduction

The state legal framework for SEA enforcement was reviewed to determine (1) how SEAs interpreted the general requirement to enforce Title I and (2) what sanctions SEAs felt they had authority to impose once it had been determined that a LEA was not acting in a manner consistent with Title I requirements. The review generally indicated that different SEAs had interpreted the enforcement requirement differently. State policies reflect marked differences among SEAs in their attitude toward enforcement and in their perceptions of enforcement strategies and available sanctions.

In general, SEAs indicated that illegal LEA practices were discovered during SEA application approval, monitoring, or auditing. In addition, OE review team reports and HEWAA audits brought illegal practices to the SEA's attention. Interviews with state Title I personnel revealed that the enforcement action taken by SEAs varied depending on the nature of the violation and/or when and how the violation was discovered.

Set forth below are a description and analysis of the federal and state legal frameworks for SEA enforcement of Title I requirements. Where appropriate, we have made recommendations for amendments to the federal legal framework for SEA enforcement. For purposes of this analysis, SEA enforcement will be discussed under six major headings: (1) SEA final dissaproval or delayed approval of applications; (2) SEA audit resolution procedures and audit exceptions; (3) SEA recoupment of misspent funds; (4) SEA withholding or suspension of Title I funds; (5) the relationship between SEA monitoring and enforcement; and (6) the applicability of the statute of limitations to SEA audit resolution.

B. SEA Final Disapproval or Delayed Approval of LEA Applications

1. The Federal Legal Framework

The federal legal framework in effect during the state interviews clearly indicates that SEAs must make a "determination" that applications "effectively meet" Title I requirements before an application can be approved.[368] Applications that do not "effectively meet" Title I requirements may not be approved. However, before a SEA finally disapproves an application in whole or in part, it must afford the LEA "reasonable notice and opportunity for a hearing with regard to such action."[369]

2. The State Legal Framework

There is general agreement among SEAs that application approval offers a prime opportunity to enforce Title I requirements. SEAs indicated that there were two enforcement sanctions available to them at the application approval stage: delay approval until the application effectively met Title I requirements or finally disapprove an application.

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[368] *See* Chapter 1, SEA Approval of LEA Applications.

[369] 45 C.F.R. §116.34(c)(1975). *See* §425 of GEPA (20 U.S.C. 1231 b-2); 45 C.F.R. §116.5(c) and (d); and §116.6(a) (1976).

With respect to delayed approval, most SEAs indicated that they would require a corrective amendment to the application and would not approve the application until it had been finally modified to conform to Title I requirements. Although the ultimate sanction at the application approval stage is final disapproval, SEAs indicated that this sanction was rarely, if ever, used. Instead, SEAs indicated that they attempted to correct violations in LEA applications through a combination of consultation, technical assistance, and negotiation. One State Title I Director commented that the SEA does not finally reject applications, but does hold up approval until the LEA application conforms to Title I requirements. Few SEAs had any written state procedures for hearings related to final disapproval of an application.

3. Policy Analysis and Recommendation

The new regulations provide that a SEA may not approve an application "unless it has been determined that the application meets all of the applicable requirements of Title I and the regulations."[370/]

[370/] 45 C.F.R. §116.5(a)(1976). 45 C.F.R. §116.5(b)(1976) also provides that the effective date of an approved application is "the date on which the application was submitted in substantially approvable form." For a discussion and analysis of this provision, *see* Chapter 1, SEA Approval of LEA Applications.

In addition, they incorporate the hearing requirements contained in Sec. 425 of GEPA.[371] and require SEAs to develop procedures for such hearings.[372] Chapter 1 of this paper has set forth a review and analysis of the legal framework governing application approval. For this reason, we will not duplicate that analysis here, but will incorporate those recommendations by reference.

Furthermore, to the extent that enforcement of Title I requirements during application approval is linked to the clarity with which those requirements are set forth in the federal legal framework, SEA enforcement during application approval would be made easier if the federal legal framework contained minimum standards for each program requirement about which SEAs must make a determination. Specific recommendations for minimum standards for each LEA program requirement are contained in a separate paper prepared as part of this study.[373] We recommend that the federal legal framework be amended to incorporate such minimum standards as an aid to enforcement of Title I requirements during the application approval process.

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[371] *See* 45 C.F.R. §116.5(c) and (d)(1976).

[372] *See* 45 C.F.R. §116.6(a)(1976).

[373] *An Analysis of the Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965*. (September, 1977).

C. SEA Audit Resolution Procedures and Audit Exceptions

1. Introduction

The purpose of this section is to describe and analyze the federal and state legal frameworks for auditing as they relate to enforcement. Thus, the section focuses on the audit exception as an enforcement sanction and SEA audit resolution procedures as a means of enforcing audit findings. Other considerations related to SEA auditing, e.g., the required scope and frequency of audits, audit standards, etc. are contained in Chapter 7, Financial Management.

2. The Federal Legal Framework

The GEPA regulations impose a requirement that the scope of audits include both "the fiscal integrity of grant or subgrant financial transactions and reports and the compliance with applicable statutes, regulations and terms and conditions of the grant or subgrant."[374] (Emphasis added.)

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[374] 45 C.F.R. §100b.301(h)(1975). See §434(a) of GEPA (20 U.S.C. 1232c).

SEAs are also required by the same regulations to have a financial management system that provides for a "systematic method to assure timely and appropriate resolutions of audit findings and exceptions".[375] Other than this requirement for a "systematic method" of resolving the results of audits, the regulations provide no guidance or minimum standards for SEA Title I audit resolution procedures.

Neither the Title I nor the GEPA statute or regulations define what constitutes an "audit exception". However, the cancelled OE publication Guidelines: Special Programs for Educationally Deprived Children[376] stated, in part, that an audit exception was

> . . . a determination by an appropriate authority that an item questioned by the auditor is not properly chargeable to the program and should be disallowed . . . [377]

The same publication also stated that one of the effective standards for local audits related to a specific program should be

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[375] 45 C.F.R. Sec. 100b.301(i)(1975).

[376] Guidelines: Special Programs for Educationally Deprived Children Elementary and Secondary Education Act of 1965/ Title I, OE-35709, (1965).

[377] *Id*. at 11.

> Assurance that exceptions reported by the auditor are brought to the attention of officials in the State office responsible for the operation of the program and assurance that appropriate adjustments or other administrative actions are taken by such officials.[378]

3. The State Legal Framework

We reviewed the state legal framework to determine if SEAs (1) used the audit exception as an enforcement sanction and (2) had the "systematic method to assure timely and appropriate resolutions of audit findings and exceptions"[379] that the GEPA regulations require.

We found, as Chapter 7, Financial Management, indicates, that the scope and frequency of state audits varies considerably. A review of state policies indicates that several states appear to perform only fiscal audits and not the fiscal and compliance audits required by GEPA regulations. However, all SEAs indicated that audit exceptions were given as a means of enforcing either the fiscal or programmatic requirements of Title I.

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[378] *Id*.

[379] 45 C.F.R. § 100b.301(i)(1975).

The findings concerning audit resolution procedures were varied. A few SEAs had written procedures for audit resolution that appeared to constitute a "systematic method to assure timely and appropriate resolutions of audit findings and exceptions". Over half of the states included in the study either did not have written audit resolution procedures or did not include them in the written materials made available to the Legal Standards Project. Several SEA Title I officials indicated that informal procedures did exist for resolving audit findings or exceptions. Some examples of state policies, both formal and informal, follow.

One SEA has a written audit resolution policy that provides that

(1) Routine audit settlements will be initiated by the program director or supervisor.

(2) Major audit settlements will be initiated by the program director or supervisor with the approval (written or verbal) of the chief SEA fiscal officer.

(3) Program directors or supervisors will be responsible for all audit settlements, follow-ups and close-outs under their jurisdiction.

(4) All audits should be closed within 90 days after they are received from the SEA audit office.

Any exceptions to this must be approved by the chief SEA fiscal officer.

(5) All audits that have not been settled within 90 days must be verified by the SEA audit office for justification for non-settlement.

(6) A written statement from program directors or supervisors will be forwarded to the SEA audit office indicating that the audit is thereby closed.

Under these procedures, the State Title I Director is responsible for determining whether an audit exception requires reimbursement. It appears from interviews that the SEA's audit policy is that if the auditor finds a minor violation that has already been remedied, the SEA will not assess a penalty. However, the SEA's audit correspondence indicates that the SEA has on several occasions obtained repayments based on SEA audits. The SEA does not have any written procedures for an audit appeal process.

Another SEA has a written policy that indicates that audit exceptions are considered overpayments. The policy states

> Any audit exception (a) by a local audit sustained by the state,(b) by the state from its own audit findings, or (c) by the U.S. Commissioner of Education from the findings of federal auditors, will constitute an overpayment. In this case, such funds shall be credited as an advance payment on the project of that [LEA] or returned by check to the [SEA].

The SEA also has a written policy that states that a LEA failure to correct discrepancies noted in an audit report is grounds for withholding funds. There are no formal audit appeal procedures or deadlines for audit resolution in this SEA. The SEA will use negotiation and friendly persuasion, but if corrections are not made for program violations, the SEA will simply withhold funds.

One State Title I Director in a SEA that does not conduct compliance audits stated that there were no written audit resolution procedures, but that if a misexpenditure is discovered by an auditor, the SEA requests reimbursement. This Title I Director indicated the SEA would not, after an application had been approved, withhold funds except for a comparability violation. The SEA had neither written audit appeal procedures nor deadlines for audit resolution.

In another state where strictly fiscal audits are performed by an elected auditor, copies of state audits are sent to the governor's office, the state attorney general, the state legislature, the state and local agencies, and newspapers. The attorney general's office is supposed to check to see what follow-up action the SEA has taken. There does not appear to be any timetable for audit resolution.

One SEA has no written audit resolution procedures. A State Title I official stated that, "We play the enforcement role after we get the report from the auditor." The SEA indicated that it would withhold funds if the requested reimbursements were not forthcoming. The SEA does not have any written procedures for hearings related to withholding. Nor is there any specific timetable for audit resolution.

4. Policy Analysis and Recommendations

The new Title I regulations do not clarify SEA audit resolution responsibilities.

The present GEPA regulations require that the scope of state audits extend to both fiscal and compliance considerations. In addition, they require a "systematic method" of resolving audit findings and exceptions, but provide no guidance or standards for state compliance with this requirement.

The review of the state legal framework indicates that several states (1) do not appear to audit on both a fiscal and compliance basis (2) do not appear to have a "systematic method" of resolving audit findings and exceptions.

The best example of a "systematic method" of resolving audit findings and exceptions appeared in the written procedures of one SEA. The procedures, in part, fixed the responsibility for the initiation of audit resolution with the program director; established a requirement that all audits should normally be settled within 90 days after the program director receives the audit report from the audit office; and required that the program director notify the audit office in writing when each audit had been closed.

The Legal Standards Project has concluded that adequate audit resolution procedures are an integral part of the SEA's enforcement obligation and that the federal legal framework fails to provide adequate guidance or minimum standards for what constitutes an acceptable "systematic method" of resolving audit findings or exceptions. The different SEA interpretations of what constitutes a "systematic method" support this conclusion.

Accordingly, we recommend that the Title I regulations be amended to require SEAs to develop and disseminate written procedures for SEA audit resolution. Such procedures shall, at a minimum, contain:

(a) the identity of the SEA division, office or official responsible for making the post-audit determination that reimbursement will be requested for Title I misexpenditures revealed by a LEA or SEA audit;

(b) a provision requiring that the SEA send to the LEA a final written determination ("final written notice") requesting reimbursement for sustained audit exceptions;

(c) a deadline for final settlement of audit reports by the responsible SEA office or official;

(d) a requirement that the responsible SEA office or official notify the audit office in writing when the audit has been settled and closed out;

(e) a description of enforcement action that can be taken in the event reimbursement is not made by the date established by the SEA for such repayments.

(f) procedures for audit appeal hearings or hearings to appeal the imposition of enforcement sanctions.

The Legal Standards Project has also concluded that different states appear to have different perceptions of SEA authority and available enforcement sanctions to require LEA reimbursement based on audit exceptions and determinations. For example, if a LEA does not reimburse the requested funds, some SEAs indicate that they have authority to withhold funds. Another SEA indicates that it has authority to consider the misexpenditure an overpayment and to deduct it from the Title I funds approved for future payment to the LEA.[380/] Another SEA thinks it lacks authority to withhold funds for anything except a comparability violation.

We conclude that SEA authority to recoup misspent funds should be clarified. This will be discussed and analyzed in the following section, "SEA Recoupment of Misspent Funds."

[380/] There is no reference in this written SEA policy to requiring the LEA to commit local funds to make up for the amount of funds withheld by the SEA. This SEA policy does not conform to the policy discussed *supra*. in the HEW/OGC memorandum.

D. SEA Recoupment of Misspent Funds

1. The Federal Legal Framework

There are two basic approaches available to SEAs for recouping misspent Title I funds. The first approach involves the direct repayment of misspent funds by the LEA to the SEA. The second alternative involves withholding payment by the SEA of a portion of the LEAs' entitlement equivalent to the amount of the misspent Title I funds. The difference between the aggregate amount and the amount paid to the LEA would then be made up out of local funds.

These two approaches are best understood by first explaining the basis for the Commissioner's authority to recoup misspent Title I funds.

As interpreted by HEW, Office of General Counsel (OGC),[381] the normal procedure used by the federal government to recoup misspent Title I funds is to indicate to the state involved that they must remit the amount indicated to OE for deposit as miscellaneous receipts of the U.S. Treasury.[382] OGC has allowed states a three year period to make such repayments.

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[381] HEW memorandum dated June 11, 1971 from Harry J. Chernok, Assistant General Counsel for Education to Dr. H. Goldberg, Associate Commissioner for Educa-Elementary and Secondary Education entitled, "Settlement of Audit Exceptions in Title I, Elementary and Secondary Education Programs."

[382] However, if an audit exception is taken with regard to an expenditure under an appropriation before the time has expired for obligation under the carryover provision (Section 412(b) of GEPA (20 U.S.C. 1226(b)) , OGC concludes that those funds would be available for reobligation to be expended for legitimate Title I purposes.

When this approach is not feasible, the Commissioner may, at his/her discretion, pursue a second approach, based on Section 435 of GEPA, appropriate regulations issued pursuant thereto,[383] and Section 143(a)(1) and Section 103 of Title I. This second approach involves the withholding by the Commissioner of the amount misspent from the state's next year's allocation. If funds are withheld from a state's allocation because of an audit exception, OGC explains that while the payment to the state is being reduced because of the debt to the United States (for misspending Title I funds), its allocation remains unchanged. Furthermore, the state must make up the difference between the aggregate amount, i.e., the entitlement and the amount paid.

> The state is, of course, responsible for approving projects of local educational agencies within the limits of the amounts of their entitlements established in accordance with Section 103 of the Act as ratably reduced by Section 144. The state would be paid for the aggregate amount of approved projects in the state less the amount withheld because of an audit exception. The difference between the aggregate amount and the amount paid to the state would have to be made up out of state and local funds.[384] [Emphasis added.]

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[383] 45 C.F.R. §100b.53(1975).

[384] HEW/OGC Memorandum, note 381, *supra*.

Set forth below is an analysis of the language of the relevant sections of the GEPA and Title I statutes and GEPA regulations forming the basis for this approach.

Section 143(a)(1) of Title I authorizes the Commissioner to pay to each state, in advance or otherwise, the amounts which the state and its LEAs are eligible to receive under Title I. The statute requires that

> such payments shall take into account the extent (if any) to which the previous payment to such [SEA] under this title (whether or not in the same fiscal year) was greater or less than the amount which should have been paid it. 385/

Similarly the GEPA statute authorizes payments under applicable programs, including Title I, to be made in installments, and in advance, or by way of reimbursement. 386/

Thus, Title I and GEPA authorize the Commissioner to make payments to state in advance of most program expenditures This payment method was included because Congress determined that it would be extremely burdensome for a local school district to use its own funds to pay for a particular service and then be reimbursed by OE at some future date.

385/ Section 143(a)(1) of Title I (20 U.S.C. 241(g)).

386/ Section 435 of GEPA (20 U.S.C. 1232d).

However, the intent of this provision is to pay the LEA only for those expenditures undertaken by the agency which fall within the scope of the Act. Where an SEA has approved expenditures which are not allowable or where LEAs use Title I funds for non-program purposes, any payments made to the state during that year can be said to have exceeded the amount which should have been paid that state by the amount of such illegal expenditures. The excess amount would be considered an "overpayment"

The GEPA statute provides, in relevant part, that:

> Payments pursuant to grants...may be made...in advance...with necessary adjustments on account of overpayments, as the Commissioner may determine. 387/

The GEPA regulations promulgated to implement this provision provide, among other things, that OE may take non-complying expenditures into account in determining "overpayments." The regulation states that

> A payment for expenditures which fail to meet the requirements of any of the provisions of applicable federal statutes or regulations may be taken into account in the determination of any such overpayments and any adjustments relating thereto. 388/

387/ Id.

388/ 45 C.F.R. §100b.53 (1975).

In other words, the above quoted provisions would authorize the Commissioner to withhold, from a subsequent year's allocation, any amount which has been expended for non-program purposes in any preceding fiscal year as constituting an "overpayment."

However, since Title I is an entitlement program, the withholding approach described above must be construed with reference to relevant sections of the Title I legal framework. The amount of Title I funds an LEA is "entitled" to is generally prescribed by Section 103 of Title I as ratably reduced under Section 144 of Title I where Congressional appropriations do not match Congressional authorizations. 389/

Thus, OE cannot reduce the amount of the entitlement; it can only reduce the amount of the state's payment. The difference between the aggregate amount and the amount paid to the state would then be made up out of state and local funds.

The OGC memorandum quoted above then explains that

> If the difference is not so made up, payments to the state in the following year would again have to be reduced in accordance with Section 143(a)(1).

389/ See chapter 5, Grant Distribution.

The principles set forth in the OGC memorandum quoted above are equally applicable to the recoupment of misspent funds pursuant to an SEA audit. 45 C.F.R. §100b.53(1975) explains the relevant federal policies with respect to the methods of payments of federal funds and refers to overpayments revealed by state audits.

> "Each state agency and subgrantee, in its maintenance of expenditure accounts, records, and reports shall promptly make any necessary adjustments in its records to reflect...overpayments resulting from federal or state administrative reviews or audits or otherwise ..." (emphasis added)

In sum, applying the principles set forth in the OGC memorandum the normal procedure which an SEA may use to recoup misspent Title I funds is to indicate to the LEA that it must remit the amount indicated by the SEA. When this approach is not possible, the SEA may satisfy audit exceptions by withholding payment of the amount of the LEA's entitlement. In this case, the difference between the aggregate amount, i.e., the LEA's entitlement and the amount paid to the LEA would have to be made up out of state and local funds.[390]

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[390] See 45 C.F.R. §100b.301(h) and (i)(1975) which generally provide that SEAs must undertake fiscal and compliance audits and then employ a systematic method to assure timely and appropriate resolution of audit findings.

2. The State Legal Framework

We sought to determine from an analysis of state written materials and interviews with SEA Title I officials how SEAs recouped misspent Title I funds.

In general, we found a lack of written state policies and procedures concerning the recoupment of misspent Title I funds. Two SEAs indicated that if necessary, future LEA payments would be reduced by the amount of past "overpayments". One had a written policy that indicates that audit exceptions are considered overpayments. The policy states

> Any audit exception (a) by a local audit sustained by the state, (b) by the state from its own audit findings, or (c) by the U.S. Commissioner of Education from the findings of federal auditors, will constitute an overpayment. In this case, such funds shall be credited as an advance payment on the project of that [LEA] or returned by check to the [SEA].

Another SEA indicated a LEA could reimburse the SEA in one of two ways: (1) by sending the SEA a check or (2) the SEA could amend the LEA application by subtracting the amount of misexpenditures from the approved funds to be paid to the LEA.

Neither the SEA indicated that they would require LEAs to spend state and local funds for Title I purposes in an amount equal to that by which the LEA payment would be reduced.

A few other SEAs indicated that they were aware that future LEA payments could be reduced by the amount of misspent funds. However, these SEAs did not indicate that they thought LEAs were required to make up the amount of misspent with state and local funds. In fact, one SEA Title I official indicated that recouping misspent funds by deducting them from the LEA's payment would be "child-punitive" because there would be less money available for supplemental services for Title I eligible children.

3. Policy Analysis and Recommendations

Under the existing legal framework there are two approaches potentially available for use by SEAs in recouping misspent Title I funds. The first approach involves the remittance of misspent funds to the SEA. This approach is clearly authorized by the GEPA regulations.[391]

Under the second approach (described _supra_), the SEA may withhold payment of a portion of the LEA's subsequent year's entitlement and require that the difference between the aggregate amount (i.e., the LEAs entitlement) and the amount paid to the LEA be made up out of state and local funds. It appears that the withholding approach is available to the SEA in accordance with 45 C.F.R. §100b.53(1975(see _supra_).

With respect to this second approach, what is not clear is the requirement that the Commissioner (or under our interpretation, the SEA) must require the SEA (or LEA) to use state and local funds to make up for the difference between the amount of the entitlement and the amount actually paid. The language of §100b.53 of the GEPA regulations does not refer to

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[391] See 45 C.F.R. §100b.301(h) and (i)(1975).

Sections 103 and 144 of Title I which have the effect of requiring that the SEA (or LEA) commit state or local funds to replace those withheld because of past misexpenditures.

We found that some SEAs apparently pursued policies which would allow LEAs to resolve audit exceptions simply by forfeiting that portion of a subsequent year's entitlement which was equivalent to the amount of the audit exception. In other words, the LEA could use Title I funds to be provided pursuant to a subsequent grant to repay the federal government for misspending Title I funds. These SEA policies are inconsistent with the policy set forth in the HEW/OGC memo.

Set forth below is a graphic illustration of the effect of such state policies. Assume for purposes of this illustration, an LEA which has certain educational priorities, the highest of which is the renovation of a gymnasium and the lowest of which is the provision of special services for educationally deprived children. The LEA's Title I allocation is $10 million.

In year 1, this LEA uses $1 million of Title I funds to renovate the gymnasium. During year 1 the SEA discovers this misexpenditures (general aid violation). On the basis of a SEA audit report, the SEA repeatedly demands that the LEA reimburse the illegal $1 million expenditure. The LEA refuses to remit the misspent funds. In year 2, the SEA withholds $1 million from that year's allocation and does not require the LEA to make up the difference in state and local funds, i.e., in year 2 the LEA forfeits part of its Title I allocation because of the previous year's misexpenditure.

The net effect of this SEA policy is that the LEA was able, in contravention of the applicable Title I requirements, to renovate a gymnasium with Title I funds without expending any state and local funds. Furthermore, the intended beneficiaries, i.e., educationally deprived children,[392] did not receive $2 million worth of benefits under Title I for a two year period, i.e., the year in which the LEA misspent the Title I funds and the year in which the SEA withheld a portion of the LEA's entitlement.

We conclude that Congress and OE in its GEPA regulations did not intend to punish the intended beneficiaries for the misdeeds of the LEA. The second approach for recouping misspent funds by withholding portions of future entitlements was intended to bring added pressure against LEAs which have not as of yet repayed misspent Title I funds pursuant to the first approach. It was not intended to provide a means of avoiding their repayment obligation.

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[392] The so-called "child-benefit theory" was central to the passage of the initial Title I legislation. Under Title I, the children are the intended beneficiaries, not the public schools or the private schools. As the Eighth Circuit Court of Appeals explained in Barrera v. Wheeler, 475 F.2d 1338, 1352, "the Act itself makes it readily apparent that Title I appropriations are a federal grant made in trust to local school agencies for the benefit of the educationally disadvantaged child." The Supreme Court, when it heard this case on appeal did not disagree with this conclusion. Wheeler v. Barrera, 417 U.S. 402(1974).

We recommend that HEW's policy, as set forth in the OGC memorandum, be expressly incorporated into GEPA regulations, i.e., where future payments of federal funds, including Title I, are withheld to reduce a so-called "overpayment", the LEA be required to make up the difference between the LEA's allocation and the amount actually paid with state and local funds.[393/]

393/ To the extent that Section 143(a)(1) of Title I, §435 of GEPA and §100b.53 of the GEPA regulations might be construed to permit LEAs to legally repay misspent federal funds with federal funds to be provided under future entitlements, we recommend that these sections be amended to reflect the policy set forth in the HEW/OGC memorandum.

As an alternative to the recoupment of misspent funds, we note that OE has offered states an alternative procedure for settlement of final audit determinations based on HEW audits from fiscal years 1965 through 1969.[394] This alternative procedure indicated that a SEA could receive its full allocation, but, in addition, would have to spend state funds for Title I purposes in an amount equal to that which had previously been misspent. We are uncertain as to the legal authority for such an alternative.

We also note that a legal opinion prepared by HEW's Assistant General Counsel for Education for the Associate Commissioner for Elementary and Secondary Education discussed such an option and indicated that this alternative procedure would be legally supportable only under certain conditions. The memorandum stated that:

394/ Commissioner's Memorandum to Chief State School Officers, "Alternative Procedures for Recovery of Funds under Title I of the Elementary and Secondary Education Act (ESEA)", August 10, 1973.

Another approach that has been suggested for the satisfaction of audit exceptions is to require the State involved to expend from its own funds for legitimate program purposes an amount equal to the amount which has previously been misspent. This amount would be in addition to the full allocation to that State under the program affected. The effect of this procedure would be to permit a State to use in a given fiscal year funds from a previous fiscal year, the expenditure of which had been improperly charged to the Title I account. However, the misexpenditure of Title I funds in that previous fiscal year resulted in a failure to properly obligate those funds; therefore, the reobligation of those funds could take place only if the time during which those funds could legally have been obligated has not expired. */ Otherwise, the appropriation has lapsed and those funds are not available for obligation. It would therefore appear that this third approach is not legally supportable, unless both the contribution of additional State

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*/ However, if an audit exception is taken with regard to an expenditure under a given appropriation before the time has expired under §405(b) of the General Education Provisions Act during which obligations and expenditures can be made from that appropriation, it would seem that those funds would be available for reobligation and expenditure by the grantee agency for legitimate program activities until the end of that period, and would not need to be repaid unless and until the time for obligating such funds has elapsed.

> *and local funds to make up for the audit exception and the expenditure of those funds takes place within the period* during *during which the Federal funds which they are replacing would have been available for expenditure by the grantee*. [Emphasis added.]395 /

In addition, it appears that there may be some problems with this approach. For example, the state or local funds committed for Title I purposes would have to be used in accordance with Title I requirements. Auditors may have problems in tracking such funds. If a LEA reallocates LEA funds to minimize the effect of committing other LEA funds for Title I purposes, this may possibly impact on the required maintenance of comparability.396/ We are of the opinion that such problems should be carefully considered.

Accordingly, we recommend that OE (a) determine the feasibility of an alternative procedure for resolving audit determinations by allowing equal amounts of state and local funds to be used for Title I in accordance with Title I requirements; and (b) if such an alternative procedure appears feasible, to seek statutory authori to authorize the Commissioner and SEAs to implement this alternative audit resolution procedure which allows SEAs and LEAs to resolve

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395/ HEW/OGC Memorandum, (June 11, 1971), note 381 , *supra*.

396/ *See* generally, Chapter 10, Comparability, in *An Analysis of the Basis for and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965*. (September, 1977) audit determinations by expending equal amounts of state and local funds for "Title I projects" in accordance with Title I requirements.

Such a procedure would provide the Commissioner and SEAs with another enforcement option. If in practice, SEAs or LEAs did not elect this option, then the Commissioner or the SEA could resort to withholding or suspending funds or reducing future payments and requiring the use of state or local funds for Title I purposes to compel reimbursement of Title I misexpenditures.

E. SEA Withholding or Suspension of Funds

1. The Federal Legal Framework

Congress clearly intended that SEAs play a major role in administering and enforcing Title I. However, with the exception of authority to withhold funds to require the remittance of misspent funds and authority to withhold funds for comparability violations,[397] the federal legal framework does not directly and expressly address the authority of SEAs to withhold or suspend funds for other Title I violations.

The Title I statute and regulations do expressly authorize the Commissioner to withhold funds -- or in his discretion to direct that a SEA shall withhold funds for non-compliance with Title I requirements. The statute provides

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[397] 45 C.F.R. §116.26(k)(1975). *See* 45 C.F.R. §116a.26(f) and §116a.26(n)(2)(1976).

> Whenever the Commissioner, after reasonable notice and, opportunity for a hearing to any [SEA], finds that there has been a failure to comply substantially with any assurance set forth in the application of that State . . . the Commissioner shall notify the agency that further payments will not be made to the State under [Title I of the Act] (or, in his discretion, that the [SEA] shall not make further payments under [Title I of the Act] to specified [LEAs] affected by the failure) Until he is so satisfied, no further payments [under Title I of the Act] shall be made to that State or payments by the [SEA] will be limited to payments to [LEAs] not affected by the failure, as the case may be.[398]

Prior to initiating a hearing, the Commissioner is required to attempt to resolve apparent differences between OE and the SEA regarding the interpretation or application of any Title I program requirements.[399]

The GEPA statute also contains a general withholding provision which is, in part, comparable to the withholding provision set forth in Title I and quoted above. In addition, this section of GEPA authorizes the Commissioner, at his discretion, to suspend payments to the SEA pending the outcome of any termination proceeding "after such recipient has been given reasonable notice and an opportunity to show cause why

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398/ Section 146 of Title I (20 U.S.C. 241j); 45 C.F.R. §116.52(a)(1975). *See* 45 C.F.R. §116.20(a)(1976).

399/ 45 C.F.R. §116.52(b)(1975). *See* 45 C.F.R. §116.20(c) (1976).

such action should not be taken."[400]

Under the express authority granted SEAs to enforce Title I requirements imposed upon LEAs by §141(a) of Title I, it can be argued that SEAs have implied authority to withhold or suspend funds for non-compliance with Title I requirements.

In addition, the GEPA statute implies in part that Congress contemplated withholding and suspension of funds by SEAs. The section of the GEPA statute governing review of applications includes, "failing to provide funds in amounts in accord with the requirements of laws and regulations"[401] and "terminating further assistance for an approved program"[402] as reasons why an "applicant or recipient aggrieved by the final action of the [SEA] and alleging a violation of state or federal law, rules, regulations, or guidelines . . ."[403] may appeal to the SEA. (Emphasis added.) We interpret this provision to mean that Congress contemplated that SEAs could withhold or suspend funding for an approved application and that the LEA could appeal such a decision to the SEA. Although the statute does not define the term "termination", we construe it to include both permanent termination and temporary termination, i.e., a final cut-off of funds or a temporary cut-off of funds.

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[400] Sec. 434(c) of GEPA (20 U.S.C. 1232c). See 45 C.F.R. §116.20(b)(1976).

[401] Sec. 425(a) of GEPA (20 U.S.C. 1231 b-2).

[402] Id.

[403] Id.

In sum, authority for SEA withholding or suspending funds for non-compliance with Title I requirements is neither direct nor express. To a large extent, SEA authority to withhold or suspend funds is implied authority.

2. The State Legal Framework

The review and analysis of the state legal framework for withholding or suspending funds reflected the implied authority in the federal legal framework. SEA interpretations ranged from, "I don't know what we would do" if a LEA refused to correct a violation other than comparability after its application had been approved to, "the SEA can withhold for any violat

Only a few SEAs had specific written policies or procedures governing withholding or suspension of funds. One SEA has a general policy that states

> Whenever the state department, after reasonable notice and opportunity for a hearing to any [LEA] finds that there has been a failure to comply substantially with any assurance of that [LEA] or in the application of the [LEA] approved by the state department, the state department will notify the [LEA] that further payment will not be made to the [LEA] educational agency under Title I, ESEA until the state department of elementary and secondary education is satisfied that there is no longer any such failure to comply.

> Prior to initiating a hearing under this section, the state department will attempt to resolve any apparent differences with the [LEA].

In addition to this general policy, the SEA has more specific policies that state that the following are sufficient cause for the SEA to withhold funds from a LEA:

> (a) LEA failure to submit an evaluation report;
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> (b) LEA failure to correct exceptions taken in a "notice of compliance" based on a SEA on-site program review;
>
> (c) LEA failure to submit a fiscal report;
>
> (d) LEA failure to submit an audit report to the SEA or a LEA failure to correct discrepancies noted in an audit report.

Another SEA has a handbook which states that "withholding of funds to school districts may occur for one or more of the following reasons:"

> (a) incorrect or incomplete information on the ESEA Title I application;
>
> (b) unauthorized expenditures;
>
> (c) failure to provide essential narrative and related data including needs assessment, performance objectives when appropriate, and lack of agreement between budget items and project narrative;
>
> (d) failure to supply required annual evaluation reports;
>
> (e) failure to submit required fiscal reports.

One SEA has used the state administrative code to promulgate a regulation governing the withholding of funds for failure to take remedial action ordered by the chief state school officer to ensure proper composition of PACs. The regulation provides that

> Compliance with the remedial action ordered by the superintendent shall be a condition to the further disbursement of Title I funds to the LEA for the then current and future fiscal years.

In contrast to these SEAs, one State Title I Director stated that one of the major problems about the enforcement function is that there are "simply no adequate enforcement alternatives" other than the strategy of enforcing at the application approval stage. If violations other than comparability were discovered after the application had been approved and the district refused to correct them, this State Title I Director said, "I don't know what we would do."

Five SEAs indicated that the SEA could withhold funds without loss for any violation, including comparability. Two of these SEAs indicated that funds could also be suspended, but not lost during the interim. Two SEAs said that they could suspend funding with a loss during the interim. The other SEA indicated that it wasn't sure if it could suspend funds with a loss during the interim.

One State Title I Director stated that he would not withhold funds for a program design violation because the federal requirements for program design are weak and vague.

With respect to SEA procedures and hearings for withholding or suspension of funds, some SEAs had no written SEA policies or regulations for them and some SEAs indicated that a formal hearing would not be conducted prior to withholding or suspending funds. For example, a State Title I official stated that when a school district is out of compliance, "You cut them off after consideration of good fiath effort on the part of the district."

One State Title I Director mentioned that the State Administrative Procedures Act was used for hearings in connection with withholding. He later indicated that the SEA would send a letter specifying the problem to the LEA and give the LEA thirty days to correct the problem or else have funds withheld as of the date of the letter.

A few SEAs had written SEA procedures for hearings related to withholding or suspending funds. One State Title I Director didn't think they were necessary. Another SEA Title I official stated that he hadn't seen any procedures but thought some existed. He indicated that if withholding were necessary, he would consult with the State Title I Director and the chief State School Officer and then call a meeting at the SEA.

3. Policy Analysis and Recommendation

The new Title I regulations do not clarify the authority of SEAs to withhold or suspend funds for non-compliance with Title I requirements. They do provide in part that SEAs must develop procedures to carry out Section 425(a) and (c) of GEPA[404] which provides, in part, for SEA hearings in connection with "failing to provide funds in amounts in accord with the requirements of laws and regulations" and "terminating further assistance for an approved program."

The Title I statute clearly provides, among other things, that the SEA must comply with the provisions of Title I, "including the enforcement of any obligations imposed upon" LEAs.[405] The regulations generally provide that the SEA will require each LEA to carry out its assurances.[406]

Although the authority of the Commissioner to withhold or suspend Title I funds is clearly set forth in the statute[407] and in the regulations[408] comparable authority is not expressly granted to SEAs, except in the area of comparability where the SEA is required to withhold under certain specified circumstances.[409]

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[404] See 45 C.F.R. §116.6(a)(1976).

[405] Sec. 142(a)(1) of Title I (20 U.S.C. 241f(a)(1)). 45 C.F.R. §116.31(c)(1975). See 45 C.F.R. §116.3(a) (1976).

[406] 45 C.F.R. §116.31(c)(1975). See 45 C.F.R. §116.3(a) 1976).

[407] Sec. 146 of Title I (20 U.S.C. 241j); §434(c) of GEPA (20 U.S.C. 1232c).

[408] 45 C.F.R. §116.52(a)(1975). See 45 C.F.R. §116.20(a) (1976).

This lack of clear SEA authority for withholding and suspension as enforcement mechanisms has created a wide variety of SEA interpretations of the requirement that the SEA must "enforce" program requirements imposed upon LEAs and of the enforcement sanctions that SEAs think they have authority to impose.

On the basis of our analysis of the federal and state legal frameworks for withholding and suspension of funds as enforcement sanctions, we have concluded that inconsistent policies about these sanctions exist among SEAs. For example, one State Title I Director feels he lacks authority to withhold for anything except a comparability violation. Some SEAs feel they can withhold for any violation. Other SEAs itemize the violations that will trigger withholding or suspension in that state. This variety of SEA interpretations about SEA authority to withhold or suspend funds appears to be directly related to the lack of express authority and clarity in the federal legal framework governing SEA authority to withhold or suspend funds to enforce Title I requirements.

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[409] 45 C.F.R. §116.26(k)(1975). See 45 C.F.R. §116a.26(f) and §116a.26(n)(2)(1976).

The Legal Standards Project is of the opinion that enforcement is a necessary SEA function and that greater clarity in the federal legal framework for SEA withholding and suspension is necessary to produce more consistent SEA interpretations of authority to enforce Title I. One State Title I Director emphasized the need for such clear enforcement authority by stating

> Strong enforcement is an absolute necessity for maintaining the compensatory nature of Title I and for assuring that educationally deprived children receive funds. Local school boards place tremendous pressure on a school system to use Title I for all kids.

We have concluded that SEAs are required to enforce obligations imposed on LEAs by Sec. 141(a) of Title I and that implied authority to withhold or suspend funds can arguably be derived from Sec. 425(a) of GEPA and from the general enforcement obligation imposed on SEAs. We have also concluded that the Title I legal framework should make explicit what is implicit by providing clear authority for SEA withholding and suspension of Title I funds to enforce Title I requirements.

We note that OE has, in the context of recently proposed regulations for state administered programs for the education of the handicapped, authorized withholding by the SEA. The proposed regulations governing withholding state, in part,

> (a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency shall:
>
> (1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or
>
> (2) Consider its decision in its review of any application made by the local educational agency . . .
>
> (3) Or both. 410/

Accordingly, we recommend that a new section be added to the Title I regulations for SEA withholding and suspension. This new section should (1) restate the requirement that SEAs must enforce the program requirements imposed upon LEAs by Sec. 141(a) of Title I; (2) expressly authorize SEAs to withhold and suspend funds to insure compliance with Title I requirements; (3) describe when such sanctions may be imposed; (4) clarify the applicability of the notice and hearing provisions of Sec. 425 of GEPA to SEA withholding and suspension of funds; and (5) require

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410/ 41 F.R. 56983 (December 30, 1976); (proposed as 45 C.F.R. §121.87).

SEAs to develop and disseminate withholding and suspension procedures not inconsistent with those contained in these recommendations.

F. The Relationship Between SEA Monitoring and Enforcement

1. The Federal Legal Framework

The GEPA regulations require the SEA to "constantly monitor."[411] The OE handbook entitled *Title I ESEA: Conducting On-Site Visits* indicates that SEA monitoring should concentrate on (1) determining compliance with legal requirements; (2) determining the fidelity of the project in operation to the project application; and (3) making a judgment as to the educational value of the activities.[412]

The OE handbook states that SEAs should write a report following the on-site visit.

> The written report should contain statements concerning the strengths and weaknesses of the program and recommendations for improvement. It should request a response within a certain period of time and call for a projected timetable from the LEA for the accomplishment of recommended activities. The report should be addressed to the superintendent with a copy to the program director.[413]

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[411] 45 C.F.R. Sec. 100b.431 (1975).

[412] *Title I ESEA: Conducting On-Site Visits* at 1.

[413] *Id.* at 6.

The OE handbook also indicates that SEA personnel should conduct follow-up visits to insure that the recommendations of monitors are being carried out.

2. The State Legal Framework

The review of the state legal framework for monitoring revealed that different SEAs have interpreted the monitoring requirement differently.[414] In general, SEAs view monitoring as an opportunity to exercise oversight over LEA implementation of Title I programs and projects, to render technical assistance, to make recommendations for improvement of projects, and to identify LEA practices that do not conform to Title I requirements.

However, there appears to be some tension between rendering technical assistance during monitoring and using monitoring for compliance purposes. For example, some states use SEA area supervisors to monitor LEAs. We were informed that these SEA staff. perceive their role as technical assistors rather than enforcers. If they discover a violation, they will usually write a letter to the non-complying LEA, stating that the LEA must take corrective action within a specified period of time. If the violation appears to be ongoing for several months, the SEA staff will not ask for a return of funds because they feel they lack sufficient fiscal expertise and because the responsibility for recovering funds is perceived as an audit resolution problem, not a monitoring function. The SEA staff never promise in writing that if the violation is corrected within the specified time period, there will be no audit consequences. The general attitude of SEA monitoring personnel appears to be "let's hope the auditors don't discover it." No requirement appears to exist in this SEA that reports of violations discovered during monitoring visits be referred through the State Title I office to the audit office.

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[414] *See* Chapter 4 , Monitoring.

Another SEA appeared to take a stronger enforcement stance during monitoring visits. We were informed that if the violation is minor, corrective action will be required and checked up on during a follow-up visit. If the violation is programmatic, but does not involve actual misexpenditures of funds, the SEA indicat that it could withhold funds pending correction of the violation. If withheld, Title I funds would be paid back to the district after the program violations had been corrected. However, if misexpenditures are discovered, the SEA indicated that it required immediate corrective action and reimbursement. Reimbursement may occur in one of two ways: the LEA may reimburse the SEA by check or the SEA may amend the application by subtracting the amount of misexpenditures from the approved funds to be paid to the LEA.

One State Title I Director indicated that if an illegal practice were discovered during a monitoring visit, the

SEA would require prospective correction of the violation, but would not require a retroactive refund of misexpenditures. Any recovery of illegally spent funds would be the result of an audit, not a monitoring visit. This SEA did not have a requirement that monitoring reports concerning apparent misexpenditures or program violations be referred through the Title I office to the audit office.

Another SEA has addressed the relationship between monitoring and auditing through a written policy which states that "Program Directors will be responsible for forwarding all monitor's reports on local school activities to the Bureau of Auditing for its information and review."

One SEA appears to distinguish between major and minor violations discovered during on-site visits. SEA Title I personnel indicated that major violations generally must be corrected within 30 days and minor violations must be corrected before the next application is submitted. No written criteria for distinguishing between major and minor violations were made available to the Legal Standards Project.

One State Title I director appeared to be at a loss about how to handle violations other than comparability that were discovered after the application had been approved. The Title I director stated that "I don't know what we would do" if the LEA refused to correct such violations voluntarily.

Two other SEAs were more positive about SEA enforcement action following the discovery of violations during on-site visits. Title I personnel in these SEAs indicated that if violations discovered as a result of monitoring were not corrected, then the SEA would withhold funds pending correction of the violation, but would repay the funds after the violations had been corrected. Other SEAs stated that, if necessary, they would suspend funds with loss of funds during the interim.

3. Policy Analysis and Recommendation

The new Title I regulations do not clarify the SEA's role and responsibilities with respect to monitoring and enforcement. The federal legal framework in effect during the state interviews does not address adequately the relationship between monitoring and enforcement. For example, the federal legal framework for monitoring is silent about what sanctions a SEA may impose following discovery of a violation other than comparability. May a SEA suspend approval of a LEA application and withhold funds until a violation discovered during a monitoring visit has been corrected?

Should monitoring reports routinely be sent to the audit office? What violations discovered during monitoring would require the SEA to order an audit?

The silence of the federal legal framework about these and related questions has produced a wide variety of SEA interpretations about the relationship between monitoring and enforcement. Of course it can be argued that the obligation to enforce Title I requirements carries with it implied authority for a SEA to impose, in its discretion, sanctions which are not otherwise inconsistent with Title I. Yet, the federal legal framework does not directly address the relationship between monitoring and enforcement. The result can be seen in the varying state legal frameworks for monitoring. One State Title I director says he doesn't know what he would do if voluntary corrections of violations other than comparability were not made after an application had been approved. Other SEAs withhold funds for violations discovered during monitoring. Some SEAs appear to order prospective corrections, but do nothing about possible misexpenditures of funds prior to the order to correct the violation.[415]

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[415] We have concluded that such misexpenditures may still be the subject of subsequent audit exceptions, i.e., a SEA monitor does not have authority to "forgive" misexpenditures of Title I funds.

We are sensitive to the tension between the technical assistance aspects and the compliance aspects of monitoring. Yet the Title I statute imposes a clear obligation on SEAs to enforce the requirements of Title I. The question then is: What additions to the federal legal framework for monitoring would help SEAs meet their obligation to enforce Title I requirements more uniformly and more effectively?

Recommendations for amendments to the legal framework for monitoring have already been set forth in Chapter 4 . We do not wish to duplicate them here, but instead to incorporate them by reference.

In addition, we recommend that the monitoring regulations be amended to impose certain SEA recordkeeping requirements that would have the effect of documenting what enforcement action a SEA had taken after discovering a violation during an on-site visit. We recommend that amended regulations:

(1) Require SEAs to keep monitoring records for each on-site visit which shall at a minimum contain;

  (a) The name of the SEA monitor and the date of the on-site visit;

  (b) The general findings of the monitoring visit;

(c) Any specific violations of any federal requirements, including Title I requirements, discovered during the monitoring visit;

(d) The recommendations of the SEA monitor for corrective action;

(e) SEA correspondence notifying the LEA of the necessity to take corrective action;

(f) LEA correspondence indicating that corrective action has been taken;

(g) Reports of SEA follow-up visits;

(h) If the LEA does not take corrective action, a record of the enforcement action taken by the SEA;

(i) The date on which final corrective action has been taken by the LEA

(2) Require SEAs to develop monitoring procedures not inconsistent with their enforcement authority and with the records requirement recommended above.

(3) Require SEAs to forward all on-site monitoring reports to the auditors for their review and information.

G. The Applicability of the Statute of Limitations to SEA Audits

1. The Federal Legal Framework

As discussed supra., Congress has passed a statute of limitations provision that has implications for enforcement of Title I requirements through audit resolution procedures. The statute reads as follows:

> No state or local educational agency shall be liable to refund any payment made to such agency under this Act (including Title I of this Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized.416 /

The legislative history indicates that the provision was intended to

> . . . lead to better administration of ESEA Programs. It will encourage HEW to make audits more promptly than has been the case. It will also remove the threat hanging over the heads of school administrators that some day, some time they may be forced to make repayments of expenditures made many years before. The Committee has been impressed by the need for this amendment from the recent experiences of many states with Title I audits.417 /

The critical point in the operation of the statute of limitations is, as the provision states, when "final written notice" is given by the federal government. The Committee report is clear on this point.

416/ Sec. 804 of Title VIII, ESEA (20 U.S.C. 884)

417/ H.R. Rep. No. 93-805, 93d Cong. 2d Sess., 79(1974).

> The Committee intends 'final written notice' to be that notice which is given after the State or local agency has been notified of the audit exception by HEW and after the Office of Education has determined that it does intend to collect on that audit exception.[418]

In correspondence with an LEA, OE concluded that it would be reasonable to construe the statute of limitations provision as applying with equal force and effect to unauthorized expenditures disclosed by state audits.

2. The State Legal Framework

We sought to determine from a review of SEA audit resolution procedures whether the statute of limitations had been interpreted as also applying to SEA audits of Title I. We found only one instance where this issue was raised.

The situation involved the discovery by an SEA auditor that a building originally paid for and used for Title I purposes was currently being used to house the central administration, i.e., for general aid purposes. The SEA first informed the LEA of the violation in 1968. Letters about the violation were exchanged between the LEA and the SEA during 1971 and 1972. In 1973 the SEA wrote the LEA informing the LEA that several thousand dollars would have to be paid back over a three year period. A Congressional inquiry to OE in 1973 produced an OE response that the LEA had been aware of the violation since 1968 and that OE supported the SEA's position.

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[418] *Id.*

The SEA then wrote to OE asking if the LEA could spend additional local funds on compensatory education rather than refund the amount. OE refused to approve this arrangement in 1973 and the SEA notified the LEA that the funds could be repaid over a three year period. In 1974 the LEA forwarded the SEA a check for the first installment, and indicated that the refund was based on a 1968 auditor's report. Then in 1975 the LEA's Congressperson wrote to the SEA requesting that the SEA cease all demand for repayment because of "undue and unjustified hardships" and the five year statute of limitations.

3. Policy Analysis and Recommendation

The implications of the statute of limitations for SEA enforcement in the form of SEA audit resolution procedures and "final written notice" from a SEA must be considered. The threshhold issue is the applicability of the statute of limitations to a SEA's final written determination based on SEA audit exceptions

OE, in correspondence with the LEA concluded that (a) the statute of limitations is applicable to state as well as federal determinations requiring the refund of any misspent Title I funds, but (b) the facts of this case indicate that the LEA had received "final written notice" from the SEA within the five year period, and as a result, the LEA must repay the misspent funds to the SEA.

We note that the statute provides, in part, that no LEA "shall be liable to refund any payment made to such agency . . . as subsequently determined to be unauthorized by law; if such payment was made more than five years before such agency received final written notice that such payment was unauthorized."[419] Standing alone, the statutory provision could be applied to SEA audits.

However, the legislative history provides some indication of Congressional intent. In attempting to clarify the meaning of "final written notice", the House Committee Report indicates that it means "that notice which is given after the State or local agency has been notified of the audit exception by HEW and after the Office of Education has determined that it does intend to collect on the audit exception."[420] (Emphasis added.) This clearly seems to indicate that Congress was expressly concerned with HEW audit exceptions and OE determinations. The House Committee Report also includes a discussion of how the audit resolution process operates. The focus of that discussion is HEW, OE, and the SEA.

The Conference Committee report paraphrases the statutory provision and indicates that the Senate receded, thereby accepting the provision in the House bill.[421] There is no mention of the applicability of the statute of limitations to audits conducted by SEAs.

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[419] See §804 of Title VII, ESEA (20 U.S.C. 884)

[420] H.R. Rep. No. 93-805, 93d Cong. 2d Sess., (1974), 79.

Based on our analysis of the legislative history, we conclude that Congress did not expressly indicate that the statute of limitations should apply to audits conducted by SEAs. However, OE's interpretation is that the statute of limitations does apply to SEA audit exceptions and SEA audit determinations. Accordingly, to the extent that it does not conflict with State law, we recommend that the statute of limitations provision be interpreted by Congress in appropriate committee reports to apply to SEA audit exceptions and SEA audit determinations involving ESEA funds.

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[421] H.R. Rep. 93-1211, 93d Cong., 2d Sess., (1974), 209.

CHAPTER 7

FINANCIAL MANAGEMENT

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CHAPTER 7
FINANCIAL MANAGEMENT

I. Introduction

This introduction to the review and analysis of the federal and state legal frameworks for SEA financial management contains (1) an overview of the federal legal framework; (2) a brief discussion of the organization of the chapter; and (3) the major issues, findings, conclusions, and recommendations contained in the chapter.

A. Overview of the Federal Legal Framework

The overview of the federal legal framework for SEA financial management includes (1) the purpose and scope of the function and the scope of this chapter; and (2) the federal legal framework for (a) SEA establishment of required fiscal controls and fund accounting procedures; (b) SEA recordkeeping and fiscal reporting requirements; and (c) audits of LEA Title I programs.

1. The Purpose and Scope of the Function and the Scope of this Chapter

The financial management "function" is a combination of several requirements imposed on SEAs to insure that Title I funds are used in a fiscally responsible manner to achieve the general purpose of Title I, i.e., to meet "the special educational needs of educationally deprived children."[422]

The ESEA Title I program directive system includes the following topics under the heading of financial management: determination of grants and payments; allocations and reallocations; notification of grant awards; fiscal control and fund accountability; auditing requirements and exceptions; financial arrangements with other programs; proration of costs; limitations on Title I funds; liquidation of obligations by SEAs or LEAs; expenditures by SEAs or LEAs; withholding of Title I funds by the Commissioner; allowable expenditures; and distribution of Title I funds to SEAs and LEAs.

This chapter will not consider all these topics.[423]

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[422] Sec. 101 of Title I (20 U.S.C. 241a).

[423] e.g., some of the aspects of determination of grants and payments, allocations and reallocations, financial arrangements with other programs, and distribution of Title I funds to LEAs are contained in Chapter 5 , SEA Grant Distribution. Withholding of Title I funds by the Commissioner is discussed in Chapter 6 , SEA Enforcement. This chapter does not discuss notification of grant awards, proration of costs, liquidation of obligations, or expenditures and allowable expenditures.

Instead, it will include the major requirements for fiscal controls and fund accountability and recordkeeping and fiscal reporting, but will focus primarily on the federal requirements for audits and the state interpretations of those requirements.424/

Although different definitions of the term "auditing" exist, the following broad definition offers a comprehensive sense of what the general term encompasses:

> Auditing is an analytical process consisting of preparation, conduct (examination and evaluation), reporting (communication), and settlement. The basic elements of this process are: an independent, competent, and professional auditor who executes the process upon an auditee for an audit recipient. The scope or area of concern can involve matters of the following nature: financial (accounting error, fraud, financial controls, fairness of financial statements, etc.), and/or compliance (faithful adherence to administrative and legal requirements, policies, regulations, etc.), and/or performance (economy, efficiency, and/or effectiveness of operational controls, management information systems, programs, etc.). The objective or purpose of auditing can be some combination of accountability and management control. 425/

424/ The discussion of state audit responsibilities in this chapter does not include an analysis of SEA audit resolution procedures. Because of their relationship to SEA enforcement of Title I requirements, SEA audit resolution procedures are discussed in Chapter 6, SEA Enforcement.

425/ P. McMickle, G. Elrod, The AIDE Project, Auditing Public Education, Alabama Department of Education, (Montgomery, Alabama, 1974) at 34.

As will be discussed infra, the GEPA regulations simply require financial and compliance auditing. Title I auditing also has an important relationship to other functions SEAs must perform under Title I. For example, a SEA monitor may discover apparent misexpenditures of Title I funds and may request an audit. An audit may reveal a need for SEA technical assistance. Or an audit may identify violations of Title I requirements that highlight the need for SEA enforcement.

As mentioned, this overview of the federal legal framework will also consider the requirements for two areas closely related to auditing: fiscal controls and fund accounting procedures and recordkeeping and fiscal reporting requirements.

2. Requirements for SEA Fiscal Controls and Fund Accounting Procedures

The GEPA and Title I statutes require that state applications submitted to the Commissioner contain assurances about fiscal controls and fund accounting procedures. The GEPA statute requires the state application to provide an assurance that

> the state will make provisions for
> such fiscal control and fund accounting
> procedures as may be necessary to assure
> proper disbursement of, and accounting

> for, Federal funds paid to the states under any applicable program 236/

The Title I statute requires that any state desiring to participate in Title I must submit through the SEA an application to the Commissioner which provides "satisfactory assurance"

> that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid to the State (including such funds paid by the State to [LEAs] under this title; 427/

The Title I regulations reinforce this requirement by stating that the state application

> shall contain an assurance that fiscal control and fund accounting procedures will be adopted to assure the proper disbursement of, and accounting for, Title I funds paid to the State, including such sums as may be paid to State and local educational agencies with respect to approved projects. 428/

With respect to control over funds and property, the Title I statute requires that a LEA provide "satisfactory

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426/ Sec. 434(b)(1)(A)(II) of GEPA (20 U.S.C. 1232c).

427/ Sec. 142(a)(2) of Title I (20 U.S.C. 241f(a)(2)). The only exception to this is programs relating to migratory children of migratory agricultural workers under Sec. 122 of Title I.

428/ 45 C.F.R. §116.31(d)(1975). See 45 C.F.R. §116.3 (a)(1)(1976).

assurance" in its application to the SEA that

> . . . control of funds provided under this title, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this title, and that a public agency will administer such funds and property 429/

The GEPA regulations also require that the SEA provide that all Title I funds are expended solely for Title I purposes. The regulations state that

> The State agency shall provide for the receipt by the State treasurer. . . and for the proper safeguarding of all federal funds granted to the State. The State agency shall provide that all federal funds so received shall be expended solely for the purposes for which granted. 430 /

429/ Sec. 141(a)(3)(A) of Title I (20 U.S.C. 241d); 45 C.F.R. §116.20(1975). See 45 C.F.R. §116.42(1976). In addition, the GEPA regulations governing property management requirements prescribe

> policies, and procedures governing title, use, and disposition of real and tangible personal property whose acquisition cost was borne in whole or in part as a direct charge by Federal grants or subgrants and ownership and rights for intangible personal property developed under Federal grants and subgrants.

45 C.F.R. §100b.209(1975).

430/ 45 C.F.R. §100b.257(1975). See 20 U.S.C. 1232(c)(b)(2).

The GEPA regulations prescribe standards for "financial management systems of Federally supported activities conducted by State agencies and their subgrantees."[431] In part, the standards require that the financial management system of a SEA provide for

> (a) Accurate, current, and complete disclosure of the financial results . . . [of grants and subgrants] [432]
>
> (b) Effective control over and accountability for all grant or subgrant funds, and real and personal property acquired with grant or subgrant funds. Grantees and subgrantees shall adequately safeguard all such property and shall assure that it is used solely for authorized purposes. [433]
>
> (c) Comparison of actual with budgeted amounts for each grant or subgrant . . . [434]

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[431] 45 C.F.R. § 100b.300(1975). The regulations pertaining to the fiscal management of Title I programs, which originally were contained in Part 116 of Title 45 of the Code of Federal Regulations have been incorporated and further expanded in Part 100b of Title 45 of the Code of Federal Regulations, which contain regulations issued pursuant to GEPA. The revocation of certain former Title I regulations related to financial management and their incorporation into GEPA regulations were described in a ESEA Title I Program Directive to State Title I Coordinators, Notice A1014 (December 6, 1973).

[432] 45 C.F.R. § 100b.301(a)(1975).

[433] 45 C.F.R. § 100b.301(c)(1975).

[434] 45 C.F.R. § 100b.301(d)(1975).

> (d)Procedures to minimize time between federal cash transfers and SEA disbursements. 435/
>
> (e)"Procedures for determining the allowability and allocability of 'costs' in accordance with cost principles prescribed by[the regulations.] 436/

In addition, the GEPA regulations establish criteria for determining when funds have been obligated. They state that

> an obligation of funds will be considered to have been incurred by a recipient on the basis of documentary evidence of binding commitments for the acquisition of goods or property, for the construction of facilities, or for the performance of work. However, the obligation of funds for personal services, for services performed by public utilities, for travel, and for the rental of equipment and facilities shall be considered to have been obligated as of the time services were rendered, such travel was performed, and such rented equipment and facilities were used, respectively. 437 /

The implication of this provision for SEA fiscal control and fund accounting procedure is that SEAs and LEAs "will use the obligation basis of accounting in maintaining fiscal

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435/ 45 C.F.R. §100b.301(e)(1975).

436/ 45 C.F.R. §100b.301(f)(1975).

437/ 45 C.F.R. §100b.55(1975). See proposed amendments to these regulations 41 F.R. 56975, December 30, 1976. 1976.

records and reporting."[438]

A comprehensive statement of SEA responsibilities in the area of SEA fiscal controls and accounting procedures appeared in the now cancelled Guidelines: Special Programs for Educationally Deprived Children. (hereinafter Guidelines) The section describing Fiscal Administration (Part B) stated, in part, that, "This part is intended to spell out for the participating State and local agencies the procedures that are to be used in accounting for federal funds . . ."[439] In addition to requiring the obligation basis of accounting, the Guidelines stated that obligations by the state "may not be incurred earlier than the effective date of [OE] approval of the State agency's application . . ." and that obligations for LEAs "will occur when the State agency gives written approval of the local project and assigns a project number."[440]

Other subjects included in the Guidelines were: accounting at the state level for state administration, accounting at the local level, the liquidation of obligations at the state and local levels, and the use of the letter of credit system.

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[438] Guidelines: Special Programs for Educationally Deprived Children Elementary and Secondary Education Act of 1965/ Title I, (OE-35079) at 5. (1965). The Guidelines were in effect until February, 1972. However, they interpreted the original predecessor to 45 C.F.R. §100b.55(45 C.F.R. §116.46(b)) to require the use of the obligation basis of accounting.

[439] Id. at 6.

[440] Id.

OE has also issued a program support package which describes the requirements for accounting for Title I funds.[441] The support package includes information about: the statutory basis for accounting controls, the accounting basis, obligations and expenditures at the state and local levels, allowable expenditures, time periods for obligations, carry-over of funds, inventories of Title I equipment, refunds to the Federal Treasury, authority to vest title to equipment, accounting records and their retention, and indirect costs.

3. SEA Recordkeeping and Fiscal Reporting Requirements

Closely related to the requirements for SEA fiscal controls and fund accounting procedures are the requirements for SEA recordkeeping and fiscal reporting.

The GEPA statute contains a basic requirement that SEAs and LEAs keep

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[441] ESEA Title I Program Directive Notice A102-3 (June 23, 1973). Other guidance about accounting practices has also been provided in a HEW publication, Handbook on Financial Accounting Classifications and Standard Terminology for Local and State School Systems, (September, 1973). HEW has also published a related handbook, that explains federal financing, DHEW Federal Assistance Financing System (August 1974). *See* Federal Management Circular 74-7: "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments", GSA (September 13, 1974).

> such records as the Assistant Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such funds are given or used, the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit. [Emphasis added.] 442/

The GEPA regulations require that "state agency financial management systems. . . shall provide [in part] for:"

> . . . Records which identify adequately the source and application of funds for grant - or subgrant - supported activities. These records shall contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, and income. 443/

The Title I regulations echo this requirement and include specific reference to fiscal control and accounting. They require that the state application contain an assurance that the SEA will

> keep such records, and afford the Commissioner such access thereto, as he may find necessary to assure the correctness of the reports required to be made and the adequacy of the fiscal control over and the accounting for Title I paid funds to the States. 444 /

442/ Sec. 434(a)(1) of GEPA (20 U.S.C. 1232c). Federal access to such records for examination and audit is required by §434 (a)(2) of GEPA (20 U.S.C. 1232c); 45 C.F.R. §100b.477(e) and 45 C.F.R. Part 100b. App. A. 5.c. (1975).

443/ 45 C.F.R. §100b.301(b)(1975).

444/ 45 C.F.R. §116.31(h)(1975). See 45 C.F.R. §116.3(a)(2)(1976).

With respect to SEA fiscal reporting requirements, the GEPA statute requires that the state application contain an assurance that ". . . the State will make provision for making such reports as the Commissioner may require to carry out his functions."[445] The Title I statute requires that the state application contain a "satisfactory assurance" that the SEA "will make to the Commissioner (A) periodic reports . . . and (B) other such reports as may be reasonably necessary to enable the Commissioner to perform his duties . . ."[446]

The GEPA regulations governing financial reporting prescribe, in part, standard forms for SEA financial reporting, including forms for a financial status report[447] and a report of federal cash transactions.[448] In addition to these financial reports, the Commissioner requires the SEA to submit an annual report concerning the distribution of Title I funds among the participating agencies within a state.[449]

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[445] Sec. 434(b)(1)(A)(ii)(III) of GEPA (20 U.S.C. Sec. 1232c).

[446] Sec. 142(a)(3) of Title I (20 U.S.C. 241f(a)).

[447] 45 C.F.R. §100b.403(a)(1975). See ESEA Title I Program Directive Inst. A310-3 (December 4, 1975).

[448] 45 C.F.R. §100b.404(a)(1975).

[449] ESEA Title I Program Directive Inst. A310.1 (November 27, 1972).

The GEPA regulations also require that all records relating to the receipt and expenditure of federal funds must be kept "intact and accessible." This requirement includes: "all accounting records and related original and supporting documents that substantiate direct and indirect costs charged to the award." In addition, the regulations require "accounting records which are supported by source documentation."[450]

With respect to record retention, the GEPA statute requires that records be retained "until the expiration of five years after the completion of the project."[451]

The Title I statute requires that a state application provide "satisfactory assurance" that the SEA will "... keep such records and afford such access thereto as the Commissioner may find necessary to assure the correctness and verification of...reports."[452]

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[450] 45 C.F.R. §100b.301(g)(1975).

[451] 45 C.F.R. §100b.477(a)(1975).

[452] Sec. 434(a)(2) of GEPA (20 U.S.C. 1232c); 45 C.F.R. Sec. 100b.477(d)(1975).

[453] Sec. 142(a)(3)(B) of Title I (20 U.S.C. 241f). The statute also requires that a SEA must determine from a review of a LEA application that the LEA ". . . will keep such records and afford such access thereto as the [SEA] may find necessary to assure the correctness and verification of reports;" Sec. 141(a)(7) of Title I (20 U.S.C. 241e); 45 C.F.R. Sec. 116.31(h)(1975).

4. Audits of LEA Title I Programs

The GEPA statute requires SEAs and LEAs to keep certain records and "such other records as will facilitate an effective audit."[454] In addition, SEAs and LEAs must permit access "for the purpose of audit and examination" to any "books, documents, papers, and records" which are determined to be relevant or pertinent.[455] The statute also requires such access "until the expiration of five years after the completion of the project or undertaking..."[456]

The GEPA regulations also impose auditing requirements.[457] The regulations provide that a state agency's financial management system for grants and a subgrantee's financial management system for subgrants shall provide for:

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[454] Sec. 434(a)(1) of GEPA (20 U.S.C. 1232c).

[455] Sec. 434(a)(2) of GEPA (20 U.S.C. 1232(c); 45 C.F.R. §100b.477(e)(1975).

[456] Id. See 45 C.F.R. §100b.477(d)(1975).

[457] After passage of GEPA, auditing requirements for Title I were incorporated into the GEPA regulations governing all OE grant-in-aid programs for education. Prior to this event, early Title I regulations contained an express requirement that LEA Title I expenditures be audited by SEA auditors or other auditors. The regulations stated that

> All expenditures by [LEAs] or by [SEAs] of Federal funds granted under Title I of the Act shall be audited either by State auditors or by other appropriate auditors. The [SEAs] shall, with due regard for Federal auditing requirements, provide for appropriate audit standards for that purpose. The results of such audits shall be used to substantiate State agency records and shall be made available to Federal auditors. Federal auditors shall be given access to such records or other documents as may be necessary to substantiate the results of such audits. (45 C.F.R. §116.48, as amended February 9. 1967.)

> audits to be made by the State agency or subgrantee or at its direction to determine, at a minimum, the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance with applicable statutes, regulations, and terms and conditions of the grant or subgrant. The grantee or subgrantee will schedule such audits with reasonable frequency, usually annually, but not less frequently than once every two years, considering the nature, size, and complexity of the activity.458 /

These regulations require that audits serve two major purposes: audits must determine both "fiscal integrity" and "compliance with applicable statutes, regulations and terms and conditions." In addition, audits must be scheduled with "reasonable frequency," which the regulations indicate means "usually annually" but "not less frequently than once every two years . . . ." Thus, at a minimum, LEAs with Title I programs must be audited at least once every two years.459/

458/ 45 C.F.R. §100b.301(h)(1975). *See* Federal Management Circular 73-2: "Audit of Federal Operations and Programs by Executive Branch Agencies" (September 23, 1973).

459/ The regulations also require that a state agency's and a subgrantee's financial management system provide for a "systematic method to assure timely and appropriate resolution of audit findings and recommendations." 45 C.F.R. §100b.301(i)(1975). Audit resolution procedures are discussed in the context of Chapter 6, SEA Enforcement.

Although the GEPA regulations provide very little guidance about audits, SEAs and LEAs have, in the past, received more detailed guidance from the original Title I guidelines, Guidelines: Special Programs for Educationally Deprived Children, in effect until February of 1972. The Guidelines were important because SEAs and LEAs appear to have derived an early sense of their Title I audit responsibilities from it.

It should be noted that the present audit policy contained in the GEPA regulations differs from the early Title I audit policy described in the Guidelines. Set forth below is a brief description of these differences in six major areas: (1) the responsibility for auditing; (2) the required scope of an audit; (3) the required frequency of auditing; (4) audit standards; (5) audit procedures; and (6) the definition of an audit exception.

First, the GEPA regulations indicate that audits are to be made by "the state agency or subgrantee or at its direction." The Guidelines placed some responsibility on SEAs to insure an adequate audit program,[460] but the principal thrust was that, "Project expenditure records will be audited locally . . . as a regular part of the local school audit procedures prescribed by State laws or regulations."[461] The Guidelines suggested that "local agency audit programs" be developed "in accordance with generally accepted auditing standards, with due consideration for federal policies governing the use of grant funds, as well as state or local policies or procedures.[462]

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[460] e.g., "It is the responsibility of the [SEA] to see that audits performed for local agencies are within State laws and practices and are adequate in terms of the standards and conditions described . . .[in the Guidelines]. . ., whether conducted by the State agency or by outside auditors. The agency should verify audits performed by it or other auditors either on a sampling basis by verifying the accuracy of project documentation at the State level or on a test check basis at the local level. Such audit reports must be made available for use of the State agency and representative of [HEW]. Guidelines at 11.

Second, the present required scope of Title I audits includes fiscal and compliance considerations.[463] The Guidelines emphasized fiscal audits by stating that, "all financial activities under this program are subject to audit at both the local and state level."[464] (Emphasis added.)

Third, the GEPA regulations provide general guidance about the frequency of audits.[465] The Guidelines were silent about how often audits should be conducted.

Fourth, the GEPA regulations are silent about standards for audits. The Guidelines stated that, "Effective standards for local audits related to specific programs should include as a minimum:

- Sufficient information for the local auditor regarding the requirements and limitations of the program to enable him to certify as to the

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461/ Id. at 10.

462/ Id. The Guidelines also referred to a "local audit report" and reports and workpapers of "local audits." Id.

463/ 45 C.F.R. Sec. 100b.301(h)(1975).

464/ Guidelines at 10. In addition, early Title I regulations emphasized audits of "expenditures". See note supra.

465/ 45 C.F.R. Sec. 100b.301(h)(1975).

- eligibility of the expenditures reported.
- Specific information in the audit report sufficient to permit reconciliation with amounts shown on the records in the State office and assurance that such reconciliation is actually made.
- Assurance that exceptions reported by the auditor are brought to the attention of officials in the state office responsible for the operation of the program and assurance that appropriate adjustments or other administrative actions are taken by such officials. 466/

Fifth, the GEPA regulations contain no mention of specific audit procedures. The Guidelines addressed the issue by stating, in the context of local audits, that, "For audits of local agencies, it is essential that specific audit procedures be developed to verify that

- Funds disbursed by the local agency were received and properly accounted for.
- Payments reported by the local agency were actually made to the vendors, contractors, and employees and that they conform to applicable laws and regulations, including procurement requirements.
- Refunds, discounts, etc., were properly credited to the specific programs as reductions of the gross expenditures.
- Payments are supported by adequate evidence of the delivery of goods or performance of services.
- Obligations reported were actually incurred during the fiscal year or project period for which the project was approved and, upon liquidation, were properly adjusted.

466/ Id. at 10-11.

- The same item is not reported as an expenditure for 2 fiscal years, e.g., obligation in one year and payment in another.
- All obligations claimed for federally supported Title I projects were made for properly approved projects and are easily identifiable with these projects.
- State and local agency rules applicable to equipment records and control are followed.
- Costs, such as salaries, travel, etc. are correctly prorated.
- The sources of funds expended for Federally reimbursed projects were stated correctly and that the same expenditures were not claimed under more than one Federal program.
- Unexpended or unearned Federal funds advanced or overpaid were returned promptly or otherwise correctly accounted for.
- If the local agency is on a fiscal year different from the Federal fiscal year, the audit report reflects outstanding obligations as of June 30 or August 31, whichever the case may be, in sufficient detail to permit identification of subsequent payments. Such obligations should be compared with reports submitted by the local agency to the State agency.467 /

Sixth, the GEPA regulations do not define what constitutes an audit exception. The *Guidelines* stated that an audit exception is

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467/ *Id*. at 10.

> a determination by an appropriate authority that an item questioned by the auditor is not properly chargeable to the program and should be disallowed. The Commissioner of Education determines the allowance or disallowance of items questioned by the auditor. 468/

As mentioned, audits are to be made by the "State agency or subgrantee or at its direction." To the best of our knowledge, neither OE nor the HEW Audit Agency (HEWAA) has ever formally published an audit guide for use by non-federal auditors. However, to the extent that they are available to non-federal auditors, HEW audit guides for HEW auditors may provide some indirect guidance to non-federal auditors.

The 1966 Title I audit guide developed for HEW auditors identified five objectives for HEW audits of Title I. HEW audits of Title I were expected to determine: (1) whether administrative and financial internal controls are adequate to provide accurate and reliable operating and financial reports essential for management evaluation and decisions; (2) whether the expenditures made are only for the established projects and programs and in accordance with applicable federal and state regulations and policies; (3) whether the administrative reviews have been made by the state agency to evaluate the operations of local projects or programs; (4) whether the state

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___/ Id. at 11.

and local educational agencies have properly reported their accountability for grants of federal funds for the projects or programs to which this guide is applicable; (5) whether the projects and programs are conducted in an economical and efficient manner and in compliance with the requirements of applicable laws and regulations.[469]

The 1973 draft revision of the HEWAA Title I Audit Guide which, although never issued in final form, is used by HEW auditors, identifies two primary audit objectives: (1) . . . determining if the LEA's planning, implementation, and operation of its Title I activities were in accordance with the intent of the program, and (2) . . . determining the effect that any mismanagement of Title I resources had and/or will have on the program in meeting the special needs of educationally deprived children.[470]

In addition, another federal publication exists, which although not specific to Title I, may be useful for SEA auditors. General procedures and standards for auditing federal programs are explained in this publication, issued under the signature

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469/ HEWAA, "Audit Guide, Elementary and Secondary Education Act of 1965, Title I, Interim Audit Instruction C-10, (Washington: HEWAA, 1966), p. 2.

470/ HEWAA, Audit Guide for Review of Local Education Agency Programs under Title I of the Elementary and Secondary Education Act of 1965, (unpublished draft, HEWAA, 1973), p. 4.

of the Comptroller General by GAO, Standards for Audit of Governmental Organizations, Programs, Activities, and Functions. (1974 reprint) (hereinafter GAO Audit Standards). The introduction to this publication states that the audit standards set forth in it are applicable to

> audits of all government organizations, programs, activities, and functions -- whether they are performed by auditors employed by Federal, State, or local Governments; independent public accountants; or others qualified to perform parts of the audit work contemplated under these standards. [Emphasis added.] 471/

B. Organization of the Chapter

Part I of this chapter has set forth an overview of the federal legal framework for SEA fiscal controls and fund accounting procedures; SEA recordkeeping and fiscal reporting; and audits of LEA Title I Programs.

Part II of this chapter contains an analysis of the federal and state legal frameworks for audits of LEA Title I programs. For analytic purposes it has been divided into six major sections: (1) the responsibility for auditing; (2) the

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471/ GAO Audit Standards at 1.

required scope of an audit; (3) the required frequency of auditing; (4) audit standards; (5) audit report distribution; and (6) records kept for auditing. Recommendations related to each of these areas have been made.

C. Major Issues, Findings, Conclusions, and Recommendations

The Legal Standards Project has made several recommendations related to auditing of LEAs for Title I purposes. The detailed recommendations are presented in Part II of this chapter. Set forth below is a summary of these recommendations and the findings and conclusions that led to the development of the recommendations.

First, with respect to the required responsibility for auditing and the required scope and frequency of auditing, the GEPA regulations require that the state agency's and a subgrantee's financial management system provide for audits to determine, at a minimum,

> the fiscal integrity of . . . financial transactions and reports and the compliance with applicable statutes, regulations, and terms and conditions . . . 472/

472/ 45 C.F.R. §100b.301(h)(1975).

Thus, the regulations indicate that the required scope of audits extends to fiscal and compliance considerations. We found only a few SEAs that appear to conduct audits that meet the scope required by the regulations. The majority of audits appear to be only fiscal audits.

We found that some SEAs do not appear to audit LEAs themselves, but that state law or policy in some states requires an annual audit of LEAs by an independent CPA or by another state office or official. In general, these annual audits by independent CPAs or by another state office or official. In general, these annual audits by independent CPAs or by other state offices or officials appear to be fiscal audits that do not consider "compliance with applicable statutes, regulations and terms and conditions..." With two exceptions SEA policies did not indicate that the findings of these annual audits conducted by independent CPAs, other state offices or officials are reviewed by the SEA.

We also found that two SEAs lack authority under state law to audit LEAs. In one state an elected state auditor conducts such audits and in the other, the state department of finance has authority under state law to conduct such audits. In this second state, state law also requires an annual audit of LEAs by an independent CPA.

Three other SEAs had authority to audit LEAs, but state law also required annual LEA audits by independent CPAs. Another SEA had authority to audit LEAs, but had a written policy that required LEAs to provide for an annual audit and submit the report to the SEA for review.

In short, it appears that auditing policies vary widely from state to state. However, based on our review of state materials and interviews with SEA Title I personnel and auditors, we have concluded that most non-federal audits involving Title I do not appear to meet the scope requirement (fiscal and compliance). They appear to be only fiscal audits.

In an attmept to reconcile these different policies, we have recommended that the GEPA regulations be amended to set forth certain conditions under which audits conducted by other state offices or officials or by independent CPAs could satisfy the auditing requirements. These conditions are, in summary, that (1) comprehensive program-specific audit instructions be provided to all auditors; (2) such audits meet the scope requirement (fiscal and compliance); (3) the SEA has written policies requiring the findings of such audits to be submitted to and reviewed by the SEA within specified times; and (4) the SEA has certain written audit resolution procedures.473/

In view of the apparent problem with the required scope of auditing, we have recommended that the scope of "compliance" be clarified to provide that the compliance aspect of each Title I audit must, at a minimum, include a review of: (1) school attendance area eligibility and targeting; (2) eligibility and targeting of children; and (3) supplemental use of Title I funds and the prohibition concerning the use of Title I for general aid. We concluded that an audit of these areas was necessary because they concern the fundamental purposes of Title I.

473/ See pp.411 - 412, infra, for the detailed recommendation.

To remedy the apparent lack of Title I audit instructions for state auditors or independent CPAs, we have recommended that the HEW Audit Agency, with assistance from OE, develop, publish, and disseminate comprehensive Title I audit instructions for state auditors and independent CPAs.

In addition, we have recommended that the lack of audit standards in the Title I legal framework be addressed by incorporating by reference (in the GEPA regulations) the GAO audit standards issued under the signature of the Comptroller General, Standards for Audit of Governmental Organizations, Programs, Activities & Functions. Recommendations have also been made about the distribution of Title I sections of audit reports to the public and to parent advisory councils.

And, finally, to minimize the problem of audit exceptions given because of inadequate documentation, we have recommended that "auditable" records, i.e., records that would enable an audit trail to be traced, be required to be kept.

II. An Analysis of the Federal and State Legal Frameworks for SEA Auditing of LEAs

A. Introduction

The primary focus of this section of the paper is on the federal and state legal frameworks for SEA auditing of LEAs.

This section will describe and analyze the major features of the federal and state legal frameworks for auditing. Recommendations concerning the federal legal framework for auditing will be made. For purposes of description and analysis, this section has been divided into six major subsections: (1) the responsibility for auditing; (2) the required scope of an audit; (3) the required frequency of auditing; (4) audit standards; (5) audit report distribution, and (6) records kept for audit.

B. The Responsibility for Auditing

1. The Federal Legal Framework

With respect to who is responsible for conducting audits, the GEPA regulations provide that audits are to be made by "the State agency or subgrantee or at its direction."474/

474/ In the context of Title I, the "state agency" is the state educational agency which the Title I regulations define as being ". . . the officer or agency primarily responsible for the state supervision of elementary and secondary schools." 45 C.F.R. §116.1(aa)(1975).

Subgrantees are defined as "the agency, institution or organization to which a subgrant is made and which is accountable to the recipient for the use of funds provided." 45 C.F.R. §100.1(1975). Subgrants are defined as "an award of money paid by a recipient as financial assistance pursuant to a grant awarded by the Commissioner." Id.

The placement of the phrase "or at its direction" is ambiguous and is subject to three interpretations. The first is that audits are to be made by the state agency (SEA) "...or at its direction." The second is that audits are to be made by the subgrantee "or at its direction". The [footnote continues]

2. The State Legal Framework

We reviewed the state legal framework to determine how SEAs had interpreted the requirement that audits are to be made by the "state agency or subgrantee or at its direction". The review of the state materials and interviews with SEA Title I personnel and auditors revealed that in some states SEA auditors audit LEAs. In other states LEAs are audited by independent CPAs or by other state offices or officials. Set forth below is a discussion of how a number of states perform the auditing function.

One SEA indicated that under state law, the SEA does not have authority to audit LEAs. That authority is vested in the state department of finance. Thus, if the SEA desires that such an audit be conducted, the state department of finance must conduct it. During an interview, it was stated that the state department of finance lacked expertise in the area of Title I. In addition, state law in the same state requires that the county superintendent of schools provide for an annual audit of all funds under the superintendent's jurisdiction and control. Each LEA school board must either arrange to have the county

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[footnote continued from previous page]

third is that audits are to be made by the state agency "or at its direction" or that audits are to be made by the subgrantee "or at its direction." We are of the opinion that this third interpretation is the most reasonable interpretation of the regulation.

superintendent provide for such an audit or must provide for the audit itself. Audits are required to be performed by a certified public accountant or by a public accountant licensed by the state accounting board.

Two other SEAs indicated that they had authority under state law to audit LEAs and did so. State law in both states also requires that LEAs be audited annually by certified public accountants. Another SEA that conducts LEA audits also has a written policy that requires LEAs to conduct annual audits of their own programs and forward copies of all such audits to the SEA. According to a written policy the SEA will "review audit reports of LEAs and send a copy of the review to the LEA and to the auditor who made the report." Another written policy states that the following are sufficient cause for the SEA to withhold funds: a LEA failure to submit an audit report to the SEA or a LEA failure to correct discrepancies noted in the report.

In another state, the SEA indicated that audits of LEAs were conducted by an elected state auditor.

3. Policy Analysis and Recommendation

The new Title I regulations are silent about the state agency's audit responsibilities. The GEPA regulations indicate that audits are to be made by the "state agency or subgrantee or at its direction."[475]

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[475] *See* note 474, *supra*.

The state legal framework indicates that most SEAs have acknowledged this basic responsibility. However, in one state an elected state auditor conducts the audits and in another the state department of finance is authorized under state law to conduct LEA audits. The fact that another division of state government must perform such audits does not appear to be inconsistent with our interpretation that such audits may be performed at the direction of the SEA.[476] However, there appears to be some indication that such audits are not performed at the SEA's direction. Furthermore, it was not clear from the states' written materials whether these SEAs reviewed audits conducted by other state offices or officials.

These situations can be contrasted with a state where the SEA has authority to audit, but the SEA has a written requirement that LEAs audit themselves annually and submit such audits to the SEA for review.

We are of the opinion that some accommodation should be made in the GEPA auditing regulation for those states where another state agency or state officer conducts audits and those states where the SEA has authority to audit but state law or state policy requires an annual audit of LEAs by an independent CPA.

We think these different state policies can be accommodated by an amendment to the GEPA regulations that addresses the

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476/ See note 474 , supra.

responsibility for conducting an audit. The relevant section of the GEPA regulations now states that audits are to be made "by the state agency or subgrantee or at its direction..." As previously mentioned[477] the location of the phrase "or at its direction" creates some ambiguity about whether audits can be made by the state agency "or at its direction." We recommend that this part of the regulation be amended to read as follows:

> ...audits to be made by the state agency or at its direction or by the subgrantee or at its direction...

We further recommend that if state law or state policy requires that (1) another state agency or officer audit LEAs or (2) that an annual audit of each LEA be conducted by an independent CPA or other licensed public accountant, such an audit may be considered as having been conducted at the direction of the SEA if the following conditions recommended for incorporation into the GEPA regulations are met:

> (a) comprehensive audit instructions have been furnished to the auditor[478]
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> (b) the audit conducted by the state agency or officer or the annual LEA audit required by state law or policy and conducted by an independent CPA meets the audit scope requirement contained in the present GEPA regulations, i.e., it determines, at a minimum, "the fiscal integrity

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[477] See note 474, supra.

[478] See pp. 423-424, infra, for a discussion of the need for comprehensive Title I audit instructions for state auditors and independent CPAs.

of grant or subgrant financial transactions and reports; and the compliance with applicable statutes, regulations, and terms and conditions of the grant or subgrant;" 479/

(c) the SEA has a written policy that requires the state agency or officer or LEA to submit, within thirty days of its completion, a copy of the final audit report to the SEA for review;

(d) the SEA has a written policy that requires it to review and respond in writing to each final audit report within 60 days from the date the SEA receives the final audit report; and

(e) the SEA has written audit resolution procedures for such audit reports containing, at a minimum,

(i) the identity of the SEA division, office or official responsible for making the final post-audit determination that reimbursement will be requested for misexpenditures revealed by the state or LEA audit;

(ii) a provision requiring that the SEA send to the LEA a final written determination ("final written notice") requesting reimbursement for any sustained audit exceptions;

(iii) a deadline for final settlement of audit reports by the responsible SEA office or official;

(iv) a requirement that the responsible SEA office or official notify the auditor in writing when the audit has been settled

(v) a description of enforcement action that can be taken in the event reimbursement is not made by the date established by the SEA for such repayments. 480/

479/ 45 C.F.R. §100b.301(h)(1975).

480/ Those aspects of this recommendation which concern SEA review of the findings of audits conducted by other state officials or independent CPAs are consistent with the requirements of the GEPA statute that the state "make provisions for such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of, and accounting for, Federal funds" paid to the state. §434(b)(1)(A) II of GEPA (20 U.S.C. 1232c). The Title I statute contains a similar requirement which includes funds paid by the state to LEAs under Title I. §142(a)(2) of Title I (20 U.S.C. 241f(a)(2)).

> (vi) procedures for audit appeal hearings or hearings to appeal the imposition of enforcement sanctions. 481/

C. The Required Scope of an Audit

1. The Federal Legal Framework

The GEPA regulations require, in part, that the scope of audits encompass both fiscal and compliance considerations. The regulations state that such audits must

> . . . determine at a minimum the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance with applicable statutes, regulations, and terms and conditions of the grant or subgrant . . . . 482 /

As mentioned *supra* , the 1966 audit guide developed for HEW auditors identified five objectives for HEW audits of Title I. Among these were a determination whether (1) administrative and financial internal controls are adequate to provide accurate and reliable operating and financial reports; (2) the expenditures are made only for the established projects and programs in

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481/ *See* the recommendations on audit resolution procedures in Chapter 6 , SEA Enforcement.

482/ 45 C.F.R. §100b.301(h)(1975).

accordance with applicable federal and state regulations and policies; and (3) whether the projects and programs are conducted in an economical and efficient manner and in compliance with the applicable laws and regulations.[483]

The draft 1973 HEWAA Audit Guide used by HEW auditors contains a lengthy discussion of selected audit areas that includes both fiscal and compliance considerations. The topics included are: (1) selection of target schools; (2) design, implementation, and evaluation of projects; (3) supplemental use of funds and comparability of services; (4) procurement of equipment, materials and facilities; (5) project activities in private schools; (6) fiscal control and reporting; and (7) parent involvement.[484]

The GAO Audit Standards contain standards providing for a scope of audit that includes financial and compliance auditing, as well as auditing for economy, efficiency, and achievement

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483/ HEWAA, "Audit Guide, Elementary and Secondary Education Act of 1965, Interim Audit Instruction C-10, (Washington: HEWAA, 1966), p. 2.

484/ HEWAA, "Audit Guide for Review of Local Educational Agency Programs Under Title I of the Elementary and Secondary Education Act of 1965, (unpublished draft, Washington, HEWAA, 1973).

of desired results. With respect to financial and compliance auditing, the publication defines such an audit as being one which

> . . . determines (a) whether financial operations are properly conducted; (b) whether the financial reports of an audited entity are presented fairly; and (c) whether the entity has complied with applicable laws and regulations. 485 /

The GAO Audit Standards also states that examinations of financial transactions, accounts, and reports and compliance with applicable laws and regulations shall include sufficient audit work to determine whether:

> (a) The audited entity is maintaining effective control over revenues, expenditures, assets, and liabilities.
>
> (b) The audited entity is properly accounting for resources, liabilities, and operations.
>
> (c) The financial reports contain accurate, reliable, and useful financial data and are fairly presented.
>
> (d) The entity is complying with the requirements of applicable laws and regulations. 486 /

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485 / GAO Audit Standards at 2.

486 / Id. at 11.

2. The State Legal Framework

We sought to determine from a review of state materials and interviews with SEA Title I personnel and auditors how SEAs had interpreted the requirement that the scope of SEA audits include both fiscal and compliance considerations. We found that a few SEAs have written policies or procedures that indicate that the scope of auditing includes both fiscal and compliance considerations. We have concluded, on the basis of written SEA materials and interviews with SEA Title I personnel and auditors, that several SEAs appear to be conducting only fiscal audits. Some examples of the varying audit practices with respect to the scope of auditing follow.

In one state where the SEA lacks authority under state law to audit LEAs, the state department of finance has authority to perform such audits. However, state law also requires that each LEA be audited annually by an independent CPA. The audit is supposed to include all local, state and federal funds, including Title I. The state department of finance has issued written audit procedures which apply to both state and federal education programs. In describing in general terms the purposes of audits of federal programs, the state procedure paraphrases the GEPA regulations by stating

> Federal regulations require that these audits determine, at a minimum, the fiscal integrity of financial transactions and reports and compliance with applicable statutes, regulations, and terms and conditions of the grant or contract.

With respect to audits of Title I, the procedure states that the objective of the local audit is to ". . . verify that the district was entitled to the funds received for conducting the project . . . ." In addition, the procedure points out that federal auditors have raised questions concerning whether funds were directed entirely toward approved Title I projects. The procedure then states: "Although the above areas are primarily the responsibility of program and school district administrators, they should be reviewed by accountants in their annual audits if adequate accounting and records are maintained."

This state's performance of the auditing function has been the subject of a number of comments made by OE review teams during the past several years. In general, OE found that the annual CPA audits only checked whether local Title I income and expenditures were accurate. They didn't check whether LEA expenditures were consistent with the line item amounts approved in the project budget. Furthermore, the CPAs did not conduct a compliance audit to determine if the program operated consistently with federal requirements. The OE review team report also concluded that the SEA did not systematically review CPA audits, nor were there any state procedures for follow-up audits or investigations.

The state responded to these OE criticisms by stating, in part, "If OE interprets the law as requiring detailed, annual line item project budget review, then an amendment to the regulations would be appropriate." In short, whereas the state procedure paraphrases the GEPA regulations concerning the requirement for fiscal and compliance audits, the state, in effect, says in response to the OE review team report that auditors are required to look generally at the LEA's books to see if the amount expended is consistent with allotments.

One SEA has a written procedure which requires that the SEA program office initiating an audit request must indicate the type of audit to be performed: fiscal, compliance, or performance. A review of copies of audit reports from this SEA shows that fiscal and compliance audits of Title I activities of Title I are requested by the Title I program office and are performed by SEA auditors. In addition to the above referenced written procedures, this SEA also has a SEA Audit Guide for Minimum Criteria for Audits.

In another SEA, auditing is primarily a fiscal review. Although SEA auditors apparently read the LEA application to determine if funds are being used as approved, the audits do not appear to encompass compliance issues. During such audits, the auditors review cancelled warrants; check bank statements to see if they agree with the accounting ledgers; compare vouchers with purchase orders, checks, invoices, contracts, and check on the location of any equipment.

One state conducts LEA audits that appear to be strictly fiscal in nature. Such audits are performed by an elected state auditor who traces an audit trail by going from the fiscal reports to the ledger to the appropriate documents. A full LEA audit usually takes one to two months, with one to two days per Title I project. The SEA indicated that the state auditor is limited by state law to a fiscal audit of federal funds. However, the SEA also indicated that it has authority to conduct performance audits of state funded programs.

3. Policy Analysis and Recommendations

The new Title I regulations do not clarify the required scope of auditing. The GEPA regulations indicate that the scope of audits must encompass both ". . . fiscal integrity of grant . . . financial transactions and reports and the compliance with the applicable statute, regulations, and terms and conditions fo the grant . . ."[487/] The GEPA regulations

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[487/] 45 C.F.R. §100b.301(h)(1975).

do not interpret this requirement.

We are of the opinion that the phrase "fiscal integrity of grant . . . financial transactions and reports" has a clear meaning to auditors and certified public accountants. For this reason, and because of the limitations of our expertise, i.e., we are not accountants or auditors, we offer no recommendation to clarify the meaning of "fiscal integrity of grant . . . transactions and reports".

However, we have concluded that the phrase "compliance with the applicable statutes, regulations, and terms and conditions of the grant" is susceptible to more than one interpretation and requires clarification. It is clear that "compliance" means that an audit must determine whether the audited activities do comply with "the applicable statute, regulations, and terms and conditions of the grant . . .". What is not clear is the scope of the determination of compliance. For example, does "compliance" mean that a state or independent CPA audit must determine whether LEA Title I projects comply with each and every program requirement imposed on LEAs by Section 141(a) of Title I and the Title I regulations? Does it mean that a state auditor or independent CPA has discretion to determine which of the applicable requirements will be reviewed? Does it mean, in a practical sense, that a state auditor or independent CPA should concentrate on the major program requirements imposed on LEAs? If so, which ones? We note that even the HEWAA Title I audit guide appears to emphasize selected areas.[488]

Different states have interpreted differently the requirement that the scope of Title I audits include both fiscal and compliance considerations. A few states conduct audits that appear to comply with this requirement. Some states and independent CPAs appear to conduct only fiscal audits. OE has criticized at least one state in the ten state survey for audits conducted by independent CPAs that do not meet the scope requirement.

We are of the opinion that the present general scope of auditing (fiscal and compliance) required by the GEPA regulations is necessary to protect the categorical nature of Title I funds and to assure program control and accountability. However, based on our analysis of state materials and interviews, we have concluded that the regulations governing the required audits should provide more specific guidance to state auditors or independent CPAs about what, in a Title I context, is the scope of the requirement that audits must also determine "compliance with applicable statutes, regulations, and terms and conditions of the grant."

488/ *See* p.414 , *supra*.

Since additional guidance should be Title I specific, rather than applicable to all programs covered by the GEPA regulations, we recommend that a separate section on state Title I auditing be added to the Title I regulations. More specifically, we recommend that this new section of the Title I regulations:

> (a) incorporate by reference the current provisions governing auditing in the GEPA regulations (45 C.F.R. §100b. 301(h) and (i) (1975);
>
> (b) clarify the required scope of SEA auditing by interpreting the phrase "compliance with applicable statutes, regulations, and terms and conditions of the grant . . . ." in a manner that indicates that the compliance aspect of each state or independent CPA audit must, at a minimum, contain a review of the following selected audit areas:
>
> > (i) school attendance area eligibility and targeting;
> >
> > (ii) eligibility and targeting of children;
> >
> > (iii) supplemental use of Title I funds and the prohibition concerning the use of Title I funds for general aid purposes.

We have concluded that an audit of these areas is necessary because these subjects concern the fundamental purposes of the Act: to provide supplemental financial assistance to LEAs serving areas with high concentrations of children from low income families and to enable these LEAs to expand and improve programs which contribute particularly to meeting the special educational needs of educationally deprived children. 489/

On a more general level, we think state auditors or independent CPAs who may not be familiar with the compliance aspects of a Title I audit would be aided in complying with the required scope of auditing if they had audit instructions that explained Title I to auditors. In this regard, we note that the GAO Audit Standards state that

> For many programs that are federally assisted, it would be neither practical nor economical for every auditor at every level of government to do his own background research on the laws, regulations, objectives and goals of his segment of the program. 490/

The GAO Audit Standards then indicate that to provide the auditor with necessary background information and to guide the auditor's judgment in the application of the GAO audit standards,

> Federal or State agencies that request State, local or other levels to make audits are expected to prepare broad, comprehensive audit instructions, tailored to particular programs or program areas. [Emphasis added.] 491/

489/ Sec. 101 of Title I (20 U.S.C. 241a).

490/ GAO Audit Standards at 4.

491/ Id.

The GAO Audit Standards further indicate that the content of such audit guidance should include

> a digest of, or at a minimum, citations to applicable statute, regulations, instruction manuals, grant agreements, and other program documents; identification of specific audit objectives and reporting requirements in terms of matters of primary interest in such areas as program compliance, economy, and effectiveness; and other audit guidelines covering specific areas in which the auditor is expected to perform. 492/

In the interests of uniform interpretation, we recommend that the HEWAA, with assistance from OE, develop and disseminate comprehensive Title I audit instructions for use by state auditors or independent CPAs. We further recommend that such audit instructions be issued as an official publication and updated whenever necessary. 493/

D. The Required Frequency of Auditing

1. The Federal Legal Framework

The GEPA regulations require that audits be scheduled

492/ *Id*. at 5.

493/ We note that the 1973 revision of the HEWAA Title I Audit Guide is used by HEW auditors, but still, in 1977, has "DRAFT" stamped on it.

"with reasonable frequency, usually annually, but not less frequently than once every two years, considering the nature, size, and complexity of the activity."[494]

2. The State Legal Framework

The review of the state written materials and the interviews revealed different state practices with respect to the frequency of audits. Some examples of these follow.

One SEA that performs both fiscal and compliance audits schedules audits in advance every two years. Another SEA that appears to perform only fiscal audits attempts to audit every one and a half years. A third SEA audits large LEAs every year and small LEAs every two years. Two SEAs provided no information about the frequency with which they audit LEAs.

Another SEA that audits LEAs has a written policy that requires LEAs to perform an annual audit. In other states, state law or policy requires that an annual audit of LEAs be performed by independent CPAs.

It appears that states falling into this latter category do not themselves audit LEAs at least once every two years. For example, one SEA Title I official stated that

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[494] 45 C.F.R. § 100b.301(h)(1975).

> State law requires that districts do an annual audit of themselves. A report of this local audit is sent to the state Commissioner. Also, on our monitoring visits we can call in state auditors. Our auditors audit only when we request it. [Emphasis added.]

A Title I official in another SEA indicated that (1) the SEA lacked authority under state law to audit LEAs; (2) the state department of finance authority had authority under state law to audit LEAs, but was too busy and lacked Title I expertise; and (3) state law required an annual LEA audit by independent CPAs.

3. Policy Analysis and Recommendations

We are of the opinion that the present GEPA regulation governing the required frequency of auditing is reasonable and should be retained in its present form.

E. Auditing Standards

1. The Federal Legal Framework

In general, auditing standards are criteria of excellence or correctness for the field of auditing.[495] The Title I and GEPA statutes and regulations are silent about auditing standards.

In June, 1972, under the signature of the Comptroller General, the GAO issued as an official publication, "Standards for Audit of Governmental Organizations, Programs, Activities and Functions." According to the Comptroller General, these standards were developed in response to a Congressional request to GAO to help "upgrade the quality of post-auditing in the States by setting standards that would enable Federal agencies to place greater reliance upon state efforts."[496/]

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[495] P. McMickle, G. Elrod, The AIDE Project, Auditing Public Education, Alabama Department of Education, (Montgomery, Alabama, 1974) at 72.

These standards include "the essence of those [standards] prescribed by the American Institute of Certified Public Accountants and additional standards for audits of a broader scope."[497/] The GAO Audit Standards include: (1) general standards; (2) examination and evaluation standards; and (3) reporting standards. Set forth below are the governmental auditing standards established by GAO.

General Standards

1. The full scope of an audit of a governmental program, function, activity, or organization should encompass:

a. An examination of financial transactions, accounts, and reports, including an evaluation of compliance with applicable laws and regulations.

b. A review of efficiency and economy in the use of resources.

c. A review to determine whether desired results are effectively achieved.

In determining the scope for a particular audit, responsible officials should give consideration to the needs of the potential users of the results of that audit.

[496/] Elmer B. Staats, "The Nation's Interest in Improving State and Local Government", (address to Regional Conference of the American Society of Public Administrators, Topeka, Kansas, October 23, 1970) at 10.

[497/] GAO Audit Standards at 1.

2. The auditors assigned to perform the audit must collectively possess adequate professional proficiency for the tasks required.

3. In all matters relating to the audit work, the audit organization and the individual auditors shall maintain an independent attitude.

4. Due professional care is to be used in conducting the audit and in preparing related reports. 498/

Examination and Evaluation Standards

1. Work is to be adequately planned.

2. Assistants are to be properly supervised.

3. A review is to be made of compliance with legal and regulatory requirements.

4. An evaluation is to be made of the system of internal control to assess the extent it can be relied upon to ensure accurate information, to ensure compliance with laws and regulations, and to provide for efficient and effective operations.

5. Sufficient, competent, and relevant evidence is to be obtained to afford a reasonable basis for the auditor's opinions, judgments, conclusions, and recommendations. 499/

Reporting Standards

1. Written audit reports are to be submitted to the appropriate officials of the organizations requiring or arranging for the audits. Copies of the reports should be sent to other officials who may be responsible for taking action on audit findings and recommendations and to others responsible or authorized to receive such reports. Copies should also be made available for public inspection.

498/ Id. at 6.

499/ Id. at 6-7.

2. Reports are to be issued on or before the dates specified by law, regulation, or other arrangement and, in any event, as promptly as possible so as to make the information available for timely use by management and by legislative officials.

3. Each report shall:

a. Be as concise as possible but, at the same time, clear and complete enough to be understood by the users.

b. Present factual matter accurately, completely, and fairly.

c. Present findings and conclusions objectively and in language as clear and simple as the subject matter permits.

d. Include only factual information, findings, and conclusions that are adequately supported by enough evidence in the auditor's working papers to demonstrate or prove, when called upon, the bases for the matters reported and their correctness and reasonableness. Detailed supporting information should be included in the report to the extent necessary to make a convincing presentation.

e. Include, when possible, the auditor's recommendations for actions to effect improvements in problem areas noted in his audit and to otherwise make improvements in operations. Information on underlying causes of problems reported should be included to assist in implementing or devising corrective actions.

f. Place primary emphasis on improvement rather than on criticism of the past; critical comments should be presented in balanced perspective, recognizing any unusual difficulties or circumstances faced by the operating officials concerned.

g. Identify and explain issues and questions needing further study and consideration by the auditor or others.

h. Include recognition of noteworthy accomplishments, particularly when management improvements in one program or activity may be applicable elsewhere.

i. Include recognition of the views of responsible officials of the organization, program, function, or activity audited on the auditor's findings, conclusions, and recommendations. Except where the possibility of fraud or other compelling reason may require different treatment, the auditor's tentative findings and conclusions should be reviewed with such officials. When possible, without undue delay, their views should be obtained in writing and objectively considered and presented in preparing the final report.

j. Clearly explain the scope and objectives of the audit.

k. State whether any significant pertinent information has been omitted because it is deemed privileged or confidential. The nature of such information should be described, and the law or other basis under which it is withheld should be stated.

4. Each audit report containing financial reports shall:

a. Contain an expression of the auditor's opinion on whether the information contained in the financial reports is presented fairly. If the auditor cannot express an opinion, the reasons therefor should be stated in the audit report.

b. State whether the financial reports have been prepared in accordance with generally accepted or prescribed accounting principles applicable to the organization, program, function, or activity audited and on a consistent basis from one period to the next. Material changes in accounting policies and procedures and their effect on the financial reports are to be explained in the audit report.

c. Contain appropriate supplementary explanatory information about the contents of the financial reports as may be necessary for full and informative disclosure about the financial operations of the organization, program, function, or activity audited. Violations of legal or other regulatory requirements, including instances of noncompliance, shall be explained in the audit report.500/

500/ *Id.* at 7-9.

2. The State Legal Framework

The state written materials on auditing made available to the Legal Standards Project were silent about audit standards.

3. Policy Analysis and Recommendations

The new Title I regulations are silent about audit standards for Title I audits or the applicability of the GAO Audit Standards to Title I audits.

With respect to the scope of auditing, the GAO audit standards indicate that the full scope of a government audit should encompass fiscal and compliance considerations; "a review of the efficiency and economy in the use of resources"; and "a review to determine whether desired results are effectively achieved."[501/] The scope of auditing required by the present GEPA regulations extends only to fiscal and compliance considerations. The recommendation in the following section reconciles these differences and retains the present scope of the GEPA regulations.

The GAO audit standards are broad and, in some instances, general. However, they do set forth minimum standards for governmental audits of federal programs. They are valuable because they are broad and general standards which, when read in the context of the GEPA and Title I requirements, establish a

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[501/] GAO Audit Standards at 6.

common and uniform set of standards for Title I audits.

Because of their broad applicability to governmental audits, we think these standards should be incorporated by reference into the GEPA regulations. We note that this has already been done by at least one other federal agency. The Treasury Department, in its interim regulations governing fiscal procedures and auditing for the general revenue sharing program, has indicated that

> . . . generally accepted auditing standards" means those auditing standards pronounced by the American Institute of Certified Public Accountants and incorporated in its Statements on Audit Standards, and further included in summary form in the Standards for Audit of Governmental Organizations, Programs, Activities, and Functions as reissued in 1974 by the Comptroller General of the United States. 502 /

Accordingly, we recommend that the GEPA regulations governing the audit aspect of a state agency's financial management system be amended by adding a section on auditing standards which would, among other things, include the following:

> All audits performed under this section shall conform to "generally accepted auditing standards" i.e., those auditing standards pronounced by the American Institute of Certified Public Accountants and incorporated in its Statements on Audit Standards, and further included in summary form in the Standards for Audit of Governmental Organizations, Programs, Activities, and Functions as reissued in 1974 by the Comptroller General of the United States. In the event that

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502/ 42 F.R. 2423 (January 11, 1977); (51 C.F.R. 51.101(c))

> any of these generally accepted accounting standards are inconsistent with a specific provision of these regulations or the statute or regulations governing a program covered by these regulations, then the specific provision of the particular statute or regulations shall control.

F. Audit Report Distribution

1. The Federal Legal Framework

The GEPA regulations are silent concerning the distribution of audit reports for state administered programs governed by Part 100b. of the regulations.

The Title I regulations in effect during the state interviews are also silent about the distribution of audit reports. However, they do imply that audit reports can be made available to parents and the public. The regulations require that each LEA application include specific plans for disseminating and making available upon request certain information about Title I to parents and the general public. Among the information required to disseminate and make available upon request are

> all pertinent documents related to [Title I] applications [and to] evaluations of the applicant's past Title I projects . . . and such other documents as may be reasonably necessary to meet the needs of such

> parents or other members of the public for information related to the comprehensive planning, operation, and evaluation of the Title I program . . . 503/ [Emphasis added.]

In addition, the regulations require that the plans for information dissemination and availability upon request include provisions for copying such information. The plans must provide for

> . . . the reproduction, upon request, of such documents free of charge or at a reasonable cost (not to exceed the additional costs incurred which are not covered by Title I funds) or provisions whereby persons requesting such copies will be given adequate opportunity to arrange for the reproduction of such documents. 504/

The GAO Audit Standards indicate that written audit reports

> . . . are to be submitted to the appropriate officials of the organizations requiring or arranging for the audits. Copies of the reports should be sent to other officials who may be responsible for taking action on audit findings and recommendations and to others responsible or authorized to receive such reports. Copies should also be made available for public inspection. 505/

503/ 45 C.F.R. §116.17(n)(1975). See also §116.17(o)(2)(ii)(1975) which indicates materials which must be furnished free of charge to Parent Advisory Councils and other information that must be made available.

504/ Id.

505/ GAO Audit Standards at page 7.

2. The State Legal Framework

Most SEAs do not appear to have written policies and procedures governing the distribution of audit reports to anyone other than State Title I directors and auditees. However, there are two exceptions to this.

One SEA has a written procedure that places responsibility for distribution of audit reports in the SEA audit office. Copies of Title I audits are required to be sent by this office to several people in different departments. These include: (1) the State Title I Director, (2) the auditee, (3) the SEA's chief fiscal officer, (4) the SEA's chief operations officer, (5) the deputy chief state school officer for management, research and finance, and (6) the legislative auditor. The SEA audit office feels that their audit distribution system maximizes the chances that adverse audit findings will not be hidden or ignored.

In another state, we were informed that a copy of the audit report goes to the governor's office, the attorney general, the state legislature, the State Title I Director and the LEA.

None of the SEA policies we reviewed required that Parent Advisory Councils receive a copy of the Title I section of the audit report from either the SEA or the LEA.

3. Policy Analysis and Recommendation

The new Title I regulations do not specifically mention distribution of either federal or state audit reports. With respect to information dissemination and availability to parents and the public of certain information, the new Title I regulations are different in some respects than those in effect during the state interviews. This poses two questions ~~related~~ to audit distribution: (1) are audit reports now among the information and materials that must be disseminated to parents and made available to the public and (2) must such reports now be furnished to Parent Advisory Councils free of charge?

The new regulations contain two references to the type of information that must be disseminated and made available to parents and the public. First, the new §116.45 governing public information requires that each application for a grant under Title I must include

> . . . specific plans for disseminating information concerning the provisions of Title I, and the applicant's past and present Title I programs -- including evaluations of such programs -- to parents and to the general public. The applicant agency shall make available to them, upon request, those applications, evaluations of the applicant's past Title I projects, all reports required by §116.46 to be submitted to the State educational agency, comparability reports and such

> *other documents as may be reasonably necessary to meet the needs of such parents or other members of the public for information related to the comprehensive planning, implementation, and evaluation of the Title I program.* 506/ [Emphasis added.]

The new §116 a.25 governing involvement of councils requires the LEA to provide sufficient information in its application to enable the SEA to determine, in part, that each council

> will be provided with the [LEA's] current application, *other information and documents* . . . *as may be needed for the effective involvement of each such council in the planning, implementation, operation and evaluation of projects under Title I.* 507 /[Emphasis added.]

Neither section mentions audit reports. We conclude that audit reports clearly fall within the category of "other such documents" and "other such information." Furthermore, they are "information related to the comprehensive planning, implementation, and evaluation" of Title I and are needed for the

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506/ 45 C.F.R. §116.45 (1976).

507/ 45 C.F.R. §116a.25(g)(3)(1976).

"effective involvement" of parent councils in the "planning, operation, and evaluation of projects under Title I." We further conclude that the Title I section of the audit reports must (1) be made available, upon request, to parents and the general public under §116.45 of the new regulations, and (2) be provided to district and local advisory councils under §116a.25(g)(3) of the new regulations.

As for whether the Title I section of the audit report can be provided free of charge, it presently depends on the section of the regulations under which the information or document is sought. If the Title I section of an audit report is requested under § 116.45 (public information) of the new regulations, then the LEA has the option of (a) providing for reproduction free of charge; (b) providing for a reproduction at reasonable costs (not to exceed the additional costs incurred which are not covered by Title I funds); or (c) providing an "adequate opportunity to arrange for the reproduction" of the audit report.[508/]

If the Title I section of an audit report is sought under §116a.25(g)(3) (involvement of councils), that section does not mention whether it may be provided free of charge.

In short, the new Title I regulations do not directly address the question of SEA audit report distribution to parents and the general public. Under one section of the new regu-

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[508/] 41 F.R. 42907 (September 28, 1976).

lations, we have argued that parents and the general public can obtain the Title I section of audit reports from the LEA. Under another section of the new regulations, we have argued that parent councils should be provided with a copy of the Title I section of audit reports. However, the lack of clarity in the new regulations about distribution of and access to audit reports suggests that differing state interpretations may arise unless the new regulations are amended to remedy this lack of clarity.

In fashioning a recommendation about the distribution of the Title I section of audit reports, we have considered that (a) nothing in the state materials reviewed indicates that parent councils receive a copy of the Title I section of audit reports; (b) two SEAs believe that a broader than usual distribution of audit reports helps insure that audit findings are acted upon; (c) access to the Title I section of audit reports is necessary if parent councils are to play an effective role in planning, implementing, and evaluating Title I; (d) some SEAs conduct audits and send copies of the audit to LEAs; (3) some LEAs have audits conducted and send copies to SEAs; and (f) the HEW Audit Agency addresses Title I audit reports about LEAs to the SEA.

Taking these factors into account, we recommend that the Title I regulations be amended to add a new section on audit report distribution and that the SEA be required to develop and disseminate written procedures for the distribution of audit reports. Such procedures shall, at a minimum, provide that

(1) Where the SEA or other state agency or official conducts an audit related to Title I and provides a final audit report to the State Title I Director, the State Title I Director shall, within 30 days of receipt of the final audit report, forward a copy of the Title I section of the audit report free of charge (a) to the district advisory council of the LEA audited and (b) written notification to each school advisory council of the availability, free of charge, of the Title I section of the audit report.

(2) Where the HEW audit agency conducts an audit related to Title I and provides a final audit report to the SEA, the SEA Title I Director shall, within 30 days of the receipt of the final audit report, forward a copy of the Title I section of the audit report free of charge to (a) the district advisory council of the LEA audited and (b) written notification to each school advisory council of the availability, free of charge, of the Title I section of the audit report.

(3) Where state law, or policy, provides that a LEA be audited annually or bi-annually by an independent CPA or other licensed public accountant, and such audit encompasses Title I and results in a final audit report, the LEA shall, within 30 days of the receipt of the final audit report, forward, free of charge, a copy of the Title I section of the audit report to (a) the district advisory council of the LEA audited and (b) written notification to each school advisory council of the availability, free of charge, of the Title I section of the audit report.

G. Records Kept for Audit

1. The Federal Legal Framework

The GEPA statute contains a basic requirement that

SEAs and LEAs keep such records as the Assistant Secretary may prescribe, including

> *records which fully disclose the amount and disposition* by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such funds are given or used, the amount of that portion of the cost of the project or undertaking supplied by other sources, *and such other records as will facilitate an effective audit*. [509] [Emphasis added.]

The GEPA regulations require that the state agency financial management system provide [in part] for: ". . . Records which identify adequately the source and application of funds for grant -- or subgrant -- supported activities. These records shall contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, and income."[510]

In addition, the regulations require "accounting records which are supported by source documentation."[511]

The GEPA regulations also require that all records relating to the receipt and expenditure of federal funds must be kept "intact and accessible." This requirement includes: "all accounting records and related original and supporting documents that substantiate direct and indirect costs charged to the award."[512]

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[509] Sec. 434(a)(1) of GEPA (20 U.S.C. 1232c). Federal access to such records for examination and audit is required by § 434(a)(2) of GEPA (20 U.S.C. 1232c); 45 C.F.R. § 100b.477(e) and 45 C.F.R. Part 100b. App. A. 5.c.(1975).

[510] 45 C.F.R. Sec. 100b.301(b) (1975).

[511] 45 C.F.R. Sec. 100b.301(g) (1975).

With respect to record retention, the GEPA statute requires that records be retained "until the expiration of five years after the completion of the project."[513]

The Title I statute requires that a state application provide "satisfactory assurance" that the SEA will ". . . keep such records and afford such access thereto as the Commissioner may find necessary to assure the correctness and verification of . . . reports."[514]

The Title I regulations echo this requirement and include specific reference to fiscal control and accounting.

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[512] 45 C.F.R. §100b.477(a)(1975); see 45 C.F.R. Part 100b.App. A.5.a.

[513] Sec. 434(a)(2) of GEPA (20 U.S.C. 1232c); see also 45 C.F.R. § 100b.477(d)(1975).

[514] Sec. 142(a)(3)(B) of Title I (20 U.S.C. 241f). The Title I statute also requires that a SEA must determine from a review of a LEA application that the LEA ". . . will keep such records and afford such access thereto as the [SEA] may find necessary to assure the correctness and verification of reports;" §141(a)(7) of Title I (20 U.S.C. 241e); 45 C.F.R. §116.31(h)(1975).

They require that the state application contain an assurance that the SEA will

> keep such records, and afford the Commissioner such access thereto, as he may find necessary to assure the correctness of the reports required to be made and the adequacy of the fiscal control over and the accounting for Title I paid funds to the States. 515/

2. The State Legal Framework

With some exceptions, we found little evidence of any written SEA policies or procedures governing recordkeeping for Title I audit purposes. The most detailed SEA procedure for Title I recordkeeping was developed in a state where SEA regulations require that auditable records be kept. Consisting of approximately thirty pages of instructions, forms, and examples, the SEA procedures were designed "to minimize the additional load put upon districts as a result of compensatory education programs, assure accuracy, and to provide a clear and definite audit trail." (Emphasis added.)

The SEA procedure indicates that audit difficulties have "been caused by district records not being readily auditable." The procedure included a partial list of the most frequently

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515/ 45 C.F.R. §116.31(h)(1975). See 45 C.F.R. §116.3 (1976).

occurring audit exception items. Among them were the following: "(a) failure to maintain source documents or records that provide justification for adjustments . . . or hand corrections to periodic reports; (b) failure to ensure adjustments are referenced to a document which contains appropriate justification and authorization for the adjustment; (c) failure to retain pertinent accounting records and periodic reports; and (d) failure to maintain time and effort reports for employees who work on more than one project." In addition, the procedure suggests that "auditable records" should be "clearly identified by program and clearly referenced by source, thus providing a definite audit trail."

3. Policy Analysis and Recommendation

To the extent that audit exceptions are related to inadequate documentation or incomplete records, the notion of "auditable records" is a useful one. Our recommendation is plain, simple, and to the point. It requires no elaborate analysis, but instead is a minor amendment designed to improve the quality of recordkeeping and to minimize the chance that audit exceptions will be taken on the basis of poor recordkeeping. We recommend that the GEPA regulations be amended to require SEAs to develop procedures that require LEAs to keep "auditable records," i.e., records which can be identified by program, source, classification, etc. and which thus provide a definite audit trail that will enable an auditor to trace a transaction from start to finish.

CHAPTER 8

EVALUATION

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CHAPTER 8

EVALUATION

I. Introduction

Since Title I was originally enacted, Congress has, on numerous occasions, expressed concern with the manner in which LEAs, SEAs, and OE were carrying out their respective responsibilities to evaluate the effectiveness of Title I programs and projects. This concern was especially evident in 1974 when Congress extended Title I for an additional three year period. The legislative history of the Education Amendments of 1974 includes statements expressing a concern with the lack of uniform and objective criteria for determining the effectiveness and success of Title I programs and the lack of a uniform format for analyzing evaluation data submitted by LEAs within a state and between states for purposes of a nationwide assessment.

We found that the OE and several state policies in effect during our interviews were generally "inadequate," when measured against the standards set forth in the legislative history. Even though the 1974 amendments are presently in effect, several of the SEAs included in our survey explained that they are waiting for OE to develop evaluation models that comply with the 1974 amendments before they modify their present policies. Since the state policies in effect during our interviews were basically the same policies in effect prior to the 1974 amendments, and since OE has not yet published or disseminated the required evaluation models, our findings about the clarity, specificity and sufficiency of the existing federal legal framework are consistent with the Congressional findings, i.e., it does not provide sufficient guidance to ensure the submission of evaluation reports containing uniform procedures and objective criteria. As a result, it is virtually impossible for a SEA to analyze LEA evaluation reports for statewide assessment purposes. Similarly, it is impossible to conduct a nationwide assessment.

Because of (a) the specificity of the Congressional findings set forth in the legislative history accompanying the 1974 amendments; (b) the limits of our expertise in this area; and (c) the fact that the OE models have not yet been disseminated, we have not included any specific recommendations concerning the efficacy of the existing evaluation requirements in the federal legal framework.

The remainder of this chapter includes a description of the present federal legal framework, a summary of the major expressions of Congressional concern included in the legislative history, and a brief summary of the OE efforts during the last two years. Finally, we will describe some of the state policies in effect during our interviews.

II. Overview of the Federal Legal Framework

Under the terms of the Title I legislation[516] and regulations[517] the LEA is responsible for evaluating at least annually the effectiveness of Title I programs in meeting the special educational needs of educationally deprived children.[518]

A similar requirement for SEAs is contained in the legislation[519] and regulations.[520] The statute generally provides that the SEA will make periodic reports to OE evaluating the "effectiveness of payments under this title and of particular programs assisted under it in improving the educational attainment of educationally deprived children." The statute also explains that such reports must include, among other things, the "results of objective measurements required by Section 141(a)(6) [LEA evaluation requirements] and of research and replication studies."

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[516] Section 141(a)(6) of Title I (20 U.S.C. 241e(a)(6)).

[517] 45 C.F.R. §116.22(1975). See 45 C.F.R. §116.43 (1976).

[518] The LEA evaluation requirement is analyzed in Chapter 8 of a separate paper prepared by the Project entitled, An Analysis of the Basis for and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965 (September 1977).

[519] Section 142(a)(3) of Title I (20 U.S.C. 241f(a)(3)).

[520] 45 C.F.R. §116.31(f)(1975). See 45 C.F.R. §116.7(a)(1976).

In accordance with the Education Amendments of 1974 the states are required to comply with several additional requirements pertaining to the evaluation function. Section 151 of Title I provides that SEAs must use models developed by OE. These models must include uniform procedures and criteria. Specifically, the Commissioner must,

> (a) provide SEAs with models for evaluations "for their use in carrying out their function...which shall include uniform procedures and criteria to be utilized...by the State agency in the evaluation of such programs." 521/
>
> (b) provide technical assistance to SEAs to "enable them to assist local educational agencies in the development and application of a systematic evaluation of programs in accordance with models developed by the Commissioner." 522/
>
> (c) develop models which specify "objective criteria which shall be utilized in the evaluation of all programs and shall outline techniques (such as longitudinal studies of children involved in such programs) and methodology (such as the use of tests which yield comparable results) for producing data which are comparable on a statewide and nationwide basis." 523/
>
> (d) consult with SEAs (where appropriate) "in order to provide for jointly sponsored objective evaluation studies of programs and projects assisted under this title within a state. 524/

521/ Section 151(d) of Title I (20 U.S.C. 241o(d)).

522/ Section 151(e) of Title I (20 U.S.C. 241o(e)).

523/ Section 151(f) of Title I (20 U.S.C. 241o(f)).

524/ Section 151(c) of Title I (20 U.S.C. 241o(c)).

The regulations in effect during our interviews reiterated the statutory requirement that the SEA prepare a periodic report evaluating the effectiveness of Title I and then explained that

> such reports shall include the results of objective measurements of educational achievement...with particular reference to progress made toward meeting the special educational needs of educationally deprived children. 525/

In addition to the policy pronouncements set forth in the regulations, OE has issued program guidelines and a handbook explaining the SEA evaluation requirement. The most comprehensive set of policies developed by OE explaining the LEA and SEA evaluation requirements (with a focus primarily on the former) were contained in a handbook entitled: Guidelines: Special Programs for Educationally Deprived Children (OE 35079). However, the handbook was cancelled in 1972. The handbook included guidance for such areas as: (a) identification of

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525/ 45 C.F.R. §116.31(f)(1975). See 45 C.F.R. §116.7 (1976):

> "(a) Annual Evaluation Reports. Following the close of each fiscal year and no later than November 15 of the next fiscal year, the State educational agency shall submit to the Commissioner reports evaluating the effectiveness of programs and projects under Title I in meeting the special educational needs of participating children during the preceding school year and the following summer period. In addition to the State annual evaluation reports required by this paragraph, each State educational agency shall submit evaluation reports for two applicant agencies applying under Part 116a, including one for such an agency whose allocation for funds under Title I of the Act for the current fiscal year is among the five highest in the State.

educational objectives; (b) the meaning of the term "objective measures;" (c) the scope of SEA responsibility with respect to synthesizing the results of programs, and (d) the utilization of evaluation data.

In a program directive issued by OE in 1972,[526] OE suggested the type of information which SEAs should include in their annual evaluation reports. The directive suggests that one section of the report

> present summation of the academic achievement of participating children supported by hard data, analysis of the achievement data, and program recommendations based on these analyses. 527/

In addition, it was suggested that another section might include:

> statistical types of information such as kinds and extent of instructional activities, supportive services, parental involvement, public, and non-public school children's participation, numbers and categories of state employed, and nature and extent of inservice training provided. 528/

It is significant that the directive did not prescribe a format for evaluation reports. Instead, OE stated that:

526/ Inst. L212.1, June 14, 1972

527/ Id.

528/ Id.

> It is expected that the reports for these years will be submitted in whatever format each State Department of Education determines to be most effective in meeting its evaluation responsibilities. [529]

III. Legislative History

Congress has periodically expressed concern about the effectiveness of OE, SEAs and LEAs in carrying out the evaluation requirements. Their perception of the problem and efforts to remedy it by legislation, can best be revealed by examining the relevant legislative history.

The Senate Report which accompanied the 1969 amendments to the Elementary and Secondary Education Act stressed the need for amendments to improve the administration of Title I programs and expand those programs in the areas of greatest need. The report found administration at the state and federal levels, rather than the legislation itself to be a primary weakness in the Title I program. [530] The Committee on Labor and Public Welfare stated in the report that:

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[529] Id.

[530] Senate Rpt. 91-634, U.S. Code Cong. and Admin. News, (1970), p. 2775.

> As a rule, [LEAs] rely on [SEAs] for expertise and guidance in meeting the requirements of the law. Since Title I makes funds available for State administration of the program, the [SEAs] can and should assist [LEAs] in planning, developing and evaluating Title I programs and projects.[531]

The report continues by noting that prior to the 1969 amendments the law required thorough evaluation of Title I programs and projects.[532] The Committee then expressed its dissatisfaction with the nature of the evaluation reports which, although required by law to contain objective measurements of educational achievement, were found to be largely subjective.

> Except for a few reports on evaluations conducted by the American Institutes for Research in the Behavioral Sciences . . . under contract with the U.S. Office of Education, the evaluation reports available to the Committee have been subjective rather than objective. Some reports were simple narratives of what happened in the projects with recommendations regarding continued operational procedures containing no reference to whether purposes of the projects, or the special educational needs of the children served were met.[533]

The Committee attributed the inadequacy of evaluation reports to a lack of expertise among LEAs and again suggested that SEAs should be assisting LEAs and that OE should provide SEAs with the necessary technical assistance to do so.

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[531] *Id.*

[532] *Id.*

[533] *Id.*

> To a great extent, [LEAs] agencies do not have the expertise to conduct proper program evaluations. [SEAs] should be assisting local schools in organizing evaluation systems. The Office of Education should be requiring the states to do so and providing technical assistance.[534]

The Act was amended in 1969 to provide that the results of research and replication studies be included in the periodic state evaluation reports to the Commissioner. In addition, it provided that LEA reports to the SEA be in accordance with specific performance criteria related to program objectives.[535]

Despite this Congressional dissatisfaction with Title I evaluations, OE was not successful in remedying the situation. Congress has expressed continued dissatisfaction, as reflected by the legislative history of the 1974 amendments.

The 1974 report of the House Committee on Education and Labor details the reasons for continued dissatisfaction with Title I evaluations. The report places the blame on OE:

> The Committee repeats its view that the Office of Education has not assumed the leadership it should have concerning evaluation activities under Title I. The only hopeful sign seems to be that the Office has recently acknowledged its own failure in this area.
>
> In OE's first "Policy Implementation Memorandum" (Dec. 26, 1972), OE assumes the blame for its failure to obtain useful and current information

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[534] Id. at p. 2776.

[535] H.R. Rep. 91-114, 91st Cong. 1st Sess., (1969), 17.

> from the States. That memorandum states that the "chaotic reporting situation (presently existing) is largely due to OE's own failure to describe to the States exactly what kinds of data it needs from them, and why and to provide detailed, timely feedback to the States on the quality and utilization of their evaluation and fiscal reports." The Committee agrees with this assessment and urges OE to correct this failing.536 /

The report then sets forth the evaluation requirements of the law and describes the purposes of evaluation reports.

> The present law requires local school districts to conduct annual evaluations of their Title I programs and to report the results of these evaluations to the State educational agencies. The States in turn must submit periodic reports (including the results of the local evaluations) to OE. The purposes of those requirements are: to enable each local educational agency to assess the effect of its program and to identify weaknesses as well as strengths of the project, thus serving as a tool for program revision and improvement; to enable each State to determine the extent to which progress has been made in reaching State goals for meeting the needs of educationally deprived children, as well as to provide a tool for State planning, management, and dissemination: and to enable the Commissioner of Education to conduct a similar analysis at the national level. 537/

The major shortcomings of the data synthesized from evaluation reports are cited as lack of uniformity and incomplete data.

> To date, provisions of the legislation have not resulted in the kinds of evaluation information anticipated. At the local level, information is generally not uniform, and program

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536/ H.R. Rep. 93-805 U.S. Code Cong. and Admin. News, (1974) p. 4111.

537/ Id.

> impact data is often incomplete, although there is evidence of program success at the local level. Furthermore, heterogeneous State reports fail to provide a basic common core of information for national analysis and synthesis. Although in the past two to three years many individual State educational agencies have indicated program success, State educational agency reports generally are a collage of diverse data, frequently providing little if any hard achievement data on program impact statewide, and incapable of synthesis with other State evaluation reports for an assessment of national program effectiveness. Thus, the reports have not readily facilitated improved administrative decisionmaking.[538]

The Committee states that OE must specify the information which SEAs are required to provide and that this information must be reported in a standardized format so that an assessment of the effectiveness of the Title I program on a nationwide basis can be made. The SEAs, in turn, should provide the necessary technical assistance to LEAs to improve evaluation design.

> What is needed in terms of a national evaluation is for the Office of Education to specify the critical information which States should provide, including data on the impact of the program on educational achievement. Further, the States should be required to report such information in a standardized format to facilitate the compilation of a report of national scope on Title I program effectiveness, and to establish a base for formation of program

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[538] *Id.*

> policy direction. In-depth technical assistance should be provided to the State educational agencies in the area of evaluation, including such items as the information required, format, procedures, and analyses.
>
> The State educational agencies in turn should provide the necessary technical assistance to local educational agencies to improve local project evaluation design which will yield the information required which can then be compiled in an acceptable format. Local educational agencies' project evaluations should yield objective achievement data on which local officials can base subsequent project modification or which can be used to identify exemplary projects.[539]

The Committee issued its report on February 21, 1974. Congress subsequently enacted the present evaluation requirements as Section 151 of Title I. It is significant that Congress placed direct responsibility on OE for the development of models for evaluations containing uniform procedures and criteria to be utilized by both the SEAs and the LEAs.[540] Moreover, Congress required that such procedures enhance the production of data which could be compared on a state as well as national level.[541]

In sum, the legislative history indicates dissatisfaction with the (a) adequacy of the technical assistance provided by SEAs relating to the evaluation of programs; (b) subjective nature of the reports and the lack of hard, objective achievement data; (c) lack of a standardized or uniform format from which systematic analyses within states and between states could be made; (d) degree of feedback offered by OE concerning the SEA reports; and (e) failure to use data included in the report for improved administrative decision-making and as a planning tool.

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[539] *Id*.

[540] Section 151(d) of Title I. (20 U.S.C. 241o(d)).

[541] Section 151(f) of Title I. (20 U.S.C. 241o(f)).

IV. The Development of OE Models Implementing The Education Amendments of 1974

OE is in the process of developing evaluation models for use at the local level and a common reporting format for use at the local and state levels. These models are intended to implement the Congressional concerns described above. In addition, OE is considering promulgating regulations setting forth comprehensive prescriptions concerning the procedures which LEAs and SEAs must pursue in preparing evaluation reports. Set forth below is a summary of OE's effort with respect to this task.

During the first year following the passage of the 1974 amendments, OE developed and then transmitted three evaluation prototypes to advisory panels composed of educational practitioners and educational researchers for their responses.

The prototypes were derived from an analysis of exemplary evaluation practices.

During the following year, until the Spring of 1976, specialists under contract with OE were sent to the Title I offices of each SEA to discuss the three prototypes and receive feedback from the states. In addition, three LEAs were visited within each SEA, for the same purpose.

For the past year, OE has begun to implement an evaluation technical assistance plan, consisting of three components. The first component is a series of references, called evaluation monograms. The evaluation monograms have been disseminated to SEAs to provide them with written materials regarding the evaluation function. These monograms are based upon the three prototypes discussed above. The second component is a series of three-day workshops conducted in ten areas throughout the nation. SEA Title I and evaluation staff were invited to attend. The Title I personnel received training to enable them to conduct evaluation workshops at the LEA level. Additionally, aids such as transparencies and tapes were provided for SEA use at the local level. The final component is the establishment of technical assistance centers which will provide consultants for SEA staff. OE also plans to publish in the Federal Register a Notice of Intent to issue regulations concerning the evaluation models.[542]

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[542] The announcement of the forthcoming Notice of Intent appears at 42 F.R. 39144 (August 2, 1977).

The emphasis of the forthcoming evaluation models is upon providing to SEAs the necessary information to enable them to submit reports which will be comparable on a statewide and nationwide basis. A common format and standard form will be developed. The implementation of a standardized evaluation system is the primary objective OE hopes to achieve with the new evaluation models.

The techniques which will be used to measure educational achievement objectively have been carefully developed. SEAs will be provided with options regarding the use of either national standards or comparisons with local children to determine the extent of educational attainment of Title I children as the direct result of Title I services. Methods have been devised, with the aid of computers, to translate the data so that it can be compared on a nationwide basis, regardless as to the standard or test employed. Options as to whether SEAs choose locally developed or criterion referenced testing will also be provided.

OE has considered some of the previous obstacles confronting effective evaluation techniques in the formulation of the new models. For example, children are chosen to participate in Title I programs on the basis of criteria which vary from state to state and thus the performance level of children who enter Title I programs across the nation is divergent. The focus of the new models, therefore, will be upon the extent of the gain achieved by the children participating in Title I programs. Thus, the developers of the new models have recognized the necessity of building into the process a mechanism to make evaluation results comparable, regardless of the initial levels of achievement by the children. In addition, program circumstances are not constant throughout the nation. The new models will be flexible enough to allow for such variations.

In conclusion, it appears from our conversations with OE staff and our independent examination of some of the materials available at this time, that OE has undergone a thorough, though time consuming, analysis of the evaluation function. The effort by OE to examine past evaluation program deficiencies and outstanding practices should, we anticipate, obviate many of the problems identified in this chapter concerning SEA administration of the evaluation function.

V. State Legal Framework

The nature and scope of the SEA evaluation report formats designed by the states included in our survey varied considerably. Whereas one state interpreted the SEA evaluation reporting provision as requiring the inclusion of summary data compiled by LEAs describing the effectiveness of Title I programs utilizing objective measures of educational attainment, other states' reports were subjective in nature, and still others were narrative descriptions containing program design statistics.

With respect to those states attempting to include objective measures of the effectiveness of the program, the authors of two reports explain the limitations of their reports due to the lack of uniform format for reporting the data. One state report begins with the following disclaimer:

> due to the lack of standardization among program reports, the only information this annual report could evaluate was the information which LEAs chose to present. The factors make it extremely difficult for third party evaluators to account for all Title I dollars spent . . . in 1972-73.

The report concluded that, "one of the major implications of this annual report is the need for a standardized reporting form for Title I projects."

The annual report for the next school year concluded, among other things, that, "there are all too few districts using reporting methods which allow their results to be compared . . . ."

In a second state the data submitted by approximately 25 percent of the LEAs in the state could not be used to prepare the state report because of one or more of the following reasons:

> (1) Scores reported in other than grade equivalent form. Percentiles and standard scores were not employed.

(2) Interval between pre-post tests not stated.

(3) Tests used were not identified.

(4) Post-testing with an instrument different than that used on the pre-test.

(5) Grade level of student not specified.

In most of the states included in our survey, it is the SEA policy to require that the LEA explain the testing approach and procedures employed, but not prescribe the methods which may be used, other than by stating that it must be an objective measurement.

Several state reports consist primarily of descriptive data explaining the number and type of children participating, the nature of the program, and the types of services paid for under Title I. For example, the SEA evaluation report in one state includes the following subject headings:

- state-wide allocation by types of eligible children
- statistics on the number of LEAs participating
- number of Title I programs operating
- number of participants
- sub-allocation distribution
- pupil enrollment by grade level
- analysis of project application approval procedures

- statistics on the number of LEA activities in the areas of parent involvement, information dissemination, inservice training, and coordination with other programs
- program staff assignments and
- a description of the major emphasis in the program.

The Title I Director in this state explained that he thought the major purpose of the evaluation report was to provide accountability for the proper use of Title I funds.

CHAPTER 9

SEA REPORTING TO THE FEDERAL GOVERNMENT/ COMPLAINT RESOLUTION

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CHAPTER 9
SEA REPORTING TO THE FEDERAL GOVERNMENT/COMPLAINT RESOLUTION

I. Introduction

This introduction to the review and analysis of the federal and state legal framework for SEA reporting to the federal government/complaint resolution contains (1) an overview of the federal legal framework; (2) a discussion of the organization of the chapter and; (3) the major issues, findings, conclusions and recommendations contained in the chapter.

A. Overview of the Federal Legal Framework

The overview of the federal legal framework for SEA reporting to the federal government/complaint resolution includes (1) the purpose and scope of the function; and (2) the federal legal framework for SEA reporting to the federal government/complaint resolution.

1. The Purpose and Scope of the Function

The purpose of the SEA reporting/complaint resolution function is to provide the Commissioner with data and information necessary to enable him to perform his duties under Title I. Among the major reports which SEAs are required to submit to the Commissioner are the following: (1) an annual SEA evaluation report; (2) comparability reports; (3) a report on the distribution of Title I funds among participating agencies; (4) a state performance report; (5) a financial status report regarding administrative and program expenditures; and (6) complaint resolution reports.

2. The Federal Legal Framework

a. Introduction -- Any state desiring to participate in a grant program under Title I must submit to the Commissioner, through its SEA, an application for such participation which must provide satisfactory assurance that the SEA will give the Commissioner "periodic reports"[543] and "other such reports as may be reasonably necessary".[544] Specifically, the Section of the Title I statute governing "periodic reports" states that the SEA

> . . .will make to the Commissioner (A) periodic reports (including the results of objective measurements required by

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[543] §142(a)(3)(A) of Title I (20 U.S.C. 241f(a)).

[544] §142(a)(3)(B) of Title I (20 U.S.C. 241f(a)).

> Section 141(a)(6) and of research and replication studies) evaluating the effectiveness of payments under this title and of particular programs assisted under it in improving the educational attainment of educationally deprived children . . . 545/

The section of the Title I statute governing "other such reports as may be reasonably necessary" requires that the SEA make to the Commissioner

> . . . such other reports as may be reasonably necessary to enable the Commissioner to perform his duties under this title (including such reports as he may require to determine the amounts which the [LEAs] of that State are eligible to receive for any fiscal year). . . 546 /

The Title I regulations promulgated to implement the statutory provisions governing SEA reports require that each application by an SEA contain an assurance to the Commissioner that the SEA will make

> . . . periodic reports to the Commissioner evaluating the effectiveness of the programs and projects of state and local educational agencies and the use of such educational agencies of grants under Title I . . . in improving the educational attainment of

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545/ §142(a)(3)(A) of Title I (20 U.S.C. 241f(a)).

546/ §142(a)(3)(B) of Title I (20 U.S.C. 241f(a)).

> educationally deprived children . . . 547/

Such periodic reports are required to include

> . . . results of objective measurements of educational achievement under the programs of the several participating educational agencies with particular reference to progress made toward meeting the special educational needs of educationally deprived children. 548/

The Title I regulations also require an assurance that the SEA "will make other such reports to the Commissioner as he may reasonably require from time to time to enable him to perform his duties under Title I . . . ." 549/ Included in the category of "such other reports" is a report which

> shall include a disclosure of any allegations of substance which may be made by [LEAs] or private individuals or organizations of actions by [SEAs or LEAs] contrary to [Title I or the regulations], a summary of the result of any investigations made or hearings held with

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547/ 45 C.F.R. §116.31(f)(1975). See 45 C.F.R. §116.3(a)(1)(1976) which requires that the annual program plan "shall include" (1) the assurances required by Section 142(a)(1) and (3) of Title I." §116.7(a) of the new regulations governs the submission data of annual SEA evaluation reports, which must be submitted following the close of each fiscal year and no later than November 15 of the next fiscal year.

548/ 45 C.F.R. §116.31(f)(1975).

549/ 45 C.F.R. §116.31(g)(1975).

> respect to those allegations, and a statement of the disposition by the [SEA] of those allegations. It is recognized that the responsibility with respect to the resolution of such matters rests in the first instance, in the [SEA]. 550 /

With respect to comparability, the Title I regulations require three reports: (1) a comparability report from each LEA which the Commissioner determines to be in a national sample; 551/ (2) a report by January 1 about non-complying LEAs; 552/ and (3) a report by March 31 about the status of non-complying LEAs. 553/

550/ Id.

551/ 45 C.F.R. §116.26(k)(1975). See 45 C.F.R. §116a.26(n)(1)(1976) which also contains this requirement.

552/ 45 C.F.R. §116.26(k)(1) and (2)(1975). The SEA must include a copy of the revised comparability report, 45 C.F.R. §116.26(k)(1975). See 45 C.F.R. §116a.26(n)(2)(i) and (ii) and (3)(1976).

553/ 45 C.F.R. §116.26(k)(1975). But see Program Directive Notice L209-8 (December 20, 1974) which provides that the SEA must report the status of the non-complying LEAs as of March 31 by May 1. See 45 C.F.R. §116a.(n)(4)(1976) which provides that the SEA must report the status of non-complying LEAs "not later than April 30."

In addition to reporting requirements imposed by the Title I statute and regulations, the GEPA statute requires that each state applying for an applicable federal program (including Title I) must submit a general application containing, among other things, an annual program plan.[554/] The statute also requires that the general application provide certain assurances, including an assurance that "the State will make provision for making such reports as the Commissioner may require to carry out his functions."[555/]

The GEPA regulations impose certain financial reporting requirements upon SEAs.[556/] SEAs are required to use certain reporting forms[557/] and to submit a financial status report[558/] and a report of federal cash transactions.[559/] Furthermore,

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[554/] §434(b)(1)(A)(i) of GEPA (20 U.S.C. §1232c); 45 C.F.R. §100b.17 and .18(1975).

[555/] §434(b)(1)(A)(ii)(III) of GEPA (20 U.S.C. §1232c); 45 C.F.R. §100b.17(1975).

[556/] 45 C.F.R. §100b. Subpart P-Financial Reporting Requirements (1975).

[557/] 45 C.F.R. §100b.402(1975).

[558/] 45 C.F.R. §100b.403(1975).

[559/] 45 C.F.R. §100b.404(1975). SEAs are also required to submit requests for advances or reimbursement (§100b.405); an outlay report and request for reimbursement for construction grants (§100b.406); and they may request supplementary treasury checks (§100b.407).

the GEPA regulations require performance reports for non-construction grants.[560]

In accordance with the provisions of the Title I and GEPA statutes and regulations, the Commissioner has required that, among other reports, the SEA submit (1) an annual SEA evaluation report;[561] (2) comparability reports;[562] (3) a report on the distribution of Title I funds among participating agencies;[563] (4) a state performance report;[564] (5) a financial status report regarding administrative and program expenditures;[565] and (6) complaint resolution reports.[566] A review of each of these reporting requirements follows.

b. Annual SEA Evaluation Report -- The Title I statute requires that the SEA submit a report "including the results of objective measurements required by Section 141(a)(6) . . ."[567] Section 141(a)(6) of Title I requires that a SEA, upon its review of a LEA application, make a determination that

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[560] 45 C.F.R. §100b.432(1975). If the Commissioner deems it necessary, performance reports for construction grants can also be required. 45 C.F.R. §100b.433(1975).

[561] ESEA Title I Program Directive INST. A203.2 (June 23, 1975).

[562] ESEA Title I Program Directive INST. L209-5 (October 15, 1976).

[563] ESEA Title I Program Directive INST. A310.1 (November 27, 1972).

[564] ESEA Title I Program Directive INST. A310-3 (December 4, 1975).

[565] *Id*.

[566] ESEA Title I Program Directive INST. A103.1 (Originally *Program Guide #70* (August 20, 1971).

> . . . effective procedures including provisions for appropriate objective measurements of educational achievement, will be adopted for evaluating at least annually the effectiveness of the programs in meeting the special educational needs of educationally deprived children.[568]

Thus, the annual SEA evaluation report must include the results of "objective measurements of educational achievement contained in LEA evaluations of Title I programs and projects. OE does not presently prescribe the format which SEAs must use for their annual evaluation report. However, Title I provides some useful measure of guidance by mandating that annual LEA evaluation reports be written "in accordance with specific performance criteria related to program objectives."[569] Complementing the statutory requirement,

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[567] Sec. 142(a)(3)(A) of Title I (20 U.S.C. 241f(a)). *See supra*, Chapter 8.

[568] Sec. 141(a)(6) of Title I (20 U.S.C. 241e).

[569] Sec. 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)). *See also* §151 of Title I (20 U.S.C. 241(o)) which, among other things, directs the Commissioner to provide SEAs with evaluation models. §151(f) states that "the models developed by the Commissioner shall specify *objective criteria* which shall be utilized in the *evaluation of all* programs and shall outline the techniques . . . and methodology . . . for producing *data which are comparable on a statewide and nationwide basis*." (Emphasis added.)

OE further suggests that one section of the report present summations of the achievement of participating children, supported by "hard data, analysis of the achievement data, and program recommendations based on these data analyses."570/

c. Comparability Reporting -- With respect to the report concerning comparability of services between project and non-project area schools, the regulations generally provide that by January 1 of each year, the SEA must submit to the Commissioner a copy of the comparability report for each LEA in the state which he determines to be in a national sample.571/

Furthermore, the SEA must submit to the Commissioner by January 1 of each year a report identifying each LEA that failed to meet the comparability requirements set forth in 45 C.F.R. §116.26. Such reports must indicate for each non-complying LEA either:

> (1) that such [LEA] has allocated or reallocated sufficient additional resources to Title I project areas so as to come into compliance with such requirements and has filed a revised comparability report reflecting such compliance or (2) that the [SEA] is withholding the payment of Title I funds to the non-complying LEA. 572/

Not later than March 31 of each year,573/ the SEA must

570/ ESEA Title I Program Information Release No. 341 (June 14, 1972), redesignated Program Information Release No. 212.1. See 45 C.F.R. §116a.26(n)(1)(1976).

571/ 45 C.F.R. §116.26(k)(1975).

572/ Id. See 45 C.F.R. §116a.26(n)(2)(1976).

573/ Id. The new regulations change this to "not later than April 30". See 45 C.F.R. §116a.26(n)(4)(1976).

report to the Commissioner whether any of the non-complying LEAs have come into compliance. For the LEAs which have come into compliance, the SEA report must include a revised comparability report reflecting such compliance as of March 31. If the LEA has not come into compliance by March 31, the SEA must finally disapprove its application.

d. Annual Report on Distribution of Title I Funds -- The annual report concerning the distribution of Title I funds among the participating agencies within a state should be submitted on a "suggested" form prepared by OE.[574] This report must provide, among other things, information regarding the allocation of county aggregate maximum grants[575] among the several LEAs in each county, the amount required by the SEA for administration (subject to statutory maximums)[576] and the total amount of Title I funds approved for the fiscal year.[577]

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[574] ESEA Title I Program Directive INST. A310.1 (November 27, 1972) Form OE-4384.

[575] 45 C.F.R. §116.33(b)(1975).

[576] 45 C.F.R. §116.33(c)(1975).

[577] 45 C.F.R. §116.41(1975); 45 C.F.R. §116.9(1975); 45 C.F.R. §100b.301(a)(1975).

e. Annual Performance Report -- The annual performance must contain such information as: the total number of residents in the school district, total in project areas, the number of children who participated in Title I programs, number of participants who received instructional and service activities in Title I programs, number of children who participated in Title I programs by racial/ethnic group, total number (FTE) of staff members assigned to Title I programs and number of parents of Title I participants who participated in district and school advisory committees and in Title I program activities.[578]

f. Financial Status Report -- The financial status report generally contains summary information for each of six categories regarding such areas as total amount of federal funds authorized, total program outlays for the period, and unobligated balance of federal funds.[579] The six categories include state administration, Part A grants to LEAs, (Basic Grants), Part B grants to LEAs (Special Incentive Grants), Part C Grants to LEAs (Special Grants), Grants to SEAs for programs for Migratory Children, and grants to SEAs for handicapped children.

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[578] ESEA Title I Program Directive INST. A310-3 (December 4, 1975) OE Form 380-2 (September, 1975).

[579] *Id*. OE Form 380-1.

g. Complaint Resolution -- Complaint resolution is not expressly mentioned in the Title I statute. It appears in the regulations in the context of the SEA reporting requirement.[580]

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[580] 45 C.F.R. §116.31(g)(1975). *See* 45 C.F.R. §116.6(b) and .7(b)(1976). §116.7(b) adds explicit reporting requirements for complaints by providing that, "The [SEA] shall report to the Commission [sic] on the disposition of all complaints filed and reviewed pursuant to the procedures developed under §116.6. Reports shall be made as follows:

(1) Interim reports. In any case, where the complaint has not been fully investigated and resolved by the expiration of a 60-day period, the State educational agency shall report at that time, the substance of the complaint to the Commissioner along with an explanation of its status;

(2) Final reports. In the case of a complaint which has been fully investigated, the State educational agency shall submit a report to the Commissioner which includes at least:

(i) The substance of any allegation and the name of the individual citizen, private organization or local educational agency making the allegation;

(ii) A summary of the results of the investigation and any hearings held concerning the allegation; and

(iii) A statement of the disposition of the complaint by the State educational agency giving the reasons for such disposition.

(3) Copies to be sent. The State educational agency upon sending its report to the Commissioner, shall send copies thereof to the appropriate applicant agency and the complainant."

The regulations in effect during the state interviews also required that an LEA application contain information sufficient to enable the SEA to determine that the LEA "has adequate procedures to insure prompt response to complaints and suggestions from parents and parent council [sic];"[581]

The report concerning the handling of complaints that SEAs or LEAs have engaged in practices contrary to the Title I statute or regulations, must be submitted on a form provided by OE.[582] This report must include, among other things, a description of the allegations mentioned in the complaint, a summary of the results of the investigations made or hearings held, a statement of the disposition by the SEA of the allegations, and SEA recommendations, if any, for OE "assistance in resolving the problem or correcting the violation."[583/]

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[581] 45 C.F.R. §116.17(o)(2)(vii)(1975). This provision has been deleted from the new regulations and replaced with a requirement that SEAs develop a complaint procedure. 45 C.F.R. §116.6(b)(1976) now requires that SEAs establish procedures for investigating complaints alleging violations of Title I, including ". . .(b) Procedures for resolving the complaints of parents and other individuals and organizations including: (1) Specific time limits for investigation and resolution of complaints, not normally to exceed 60 days; (2) An opportunity for the complainant to present evidence to the State educational agency; and (3) Dissemination of information concerning procedures under this paragraph to interested parties, including parent advisory councils." For reasons discussed *infra*, at we are of the opinion that these regulations do not adequately address the issue of complaint resolution.

[582] "Investigation Report on the Administration of ESEA, Title I-OE-4517".

B. Organization of the Chapter

Part I of this Chapter has set forth an overview of the federal legal framework for SEA reporting to the federal government and complaint resolution. Part II of this chapter is primarily concerned with an analysis of the federal and state legal frameworks for complaint resolution. We have chosen to focus on complaint resolution because of our conclusion that, except for the annual SEA evaluation report, other aspects of the federal legal framework for SEA reporting are sufficiently clear and are supplemented by standard OE reporting forms. And since the annual SEA evaluation report is considered in the context of Chapter 8 , SEA Evaluation, further discussion is not warranted in this chapter.

583/ ESEA Title I Program Guide #70 (August 20, 1971). Redesignated as ESEA Title I Program Directive A.103.1.

Consequently, Part II of this Chapter contains a description and analysis of the federal and state legal frameworks for complaint resolution. In addition, certain recommendations for amendments to the federal legal framework for complaint resolution are set forth in Part II.

C. Major Issues, Findings, Conclusions and Recommendations

The Legal Standards Project recommends that the Title I regulations governing complaint resolution be amended to incorporate an interlocking system of complaint resolution procedures for LEAs, SEAs and OE. These recommendations are set forth in detail in Part II of this Chapter. A brief overview of the important issues and findings that led to the development of these recommendations is presented below.

The Title I regulations in effect during the state interviews addressed complaint resolution in two ways. First, in the context of a reporting requirement, SEAs were required to submit complaint resolution reports and were responsible "in the first instance"[584] for complaint resolution.

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[584] 45 C.F.R. §116.31(g)(1975).

Second, in the context of what a SEA was required to determine upon review of a LEA application, LEAs were required to develop "adequate procedures to insure prompt response to complaints and suggestions from parents and parent councils."[585] The Title I regulations did not clarify the relationship between SEA and LEA complaint resolution responsibilities.

In general, we found that the state legal framework did not adequately address the relationship between SEA and LEA complaint resolution responsibilities; that few SEAs had any written complaint resolution procedures; that two SEAs did not appear to submit complaint resolution reports; and that, in approximately half the states studied, written LEA complaint resolution procedures were not required.

The new Title I regulations deleted the express requirement for LEA complaint procedures; established certain minimum standards for SEA complaint resolution procedures; imposed more detailed complaint resolution reporting requirements on SEAs; and, in general, appear to have shifted

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585/ 45 C.F.R. §116.17(o)(2)(vii)(1975).

the focus of complaint resolution to the SEA.[586]

We have concluded that the new regulations do not establish a system of complaint resolution procedures best suited to the needs of Title I. They appear to have the effect of making it less likely that complaints can be resolved where they will probably arise: at the local level. Furthermore, other than casting OE in the passive role of receiving complaint resolution reports from SEAs, they are silent about OE's ultimate responsibility to resolve Title I complaints that cannot be resolved satisfactorily at the LEA or the SEA level.

Consequently, we have developed detailed recommendations for amendments to the Title I regulations that would require certain minimum procedures for complaint resolution at the LEA, SEA, and OE levels. In part, the recommendations would permit an appeal from an LEA decision to the SEA and from an SEA decision to OE, and would, in our opinion, provide a comprehensive, integrated system of complaint resolution for Title I.

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[586] See 45 C.F.R. §§116.6 and 116.7 (1976).

II. An Analysis of the Complaint Resolution Requirement

A. Introduction

The federal legal framework for SEA reporting to the federal government/complaint resolution is, with the exception of the provisions governing the annual SEA evaluation report and complaint resolution, set forth in terms that are generally clear and understandable. SEAs are required to submit "periodic reports" and "other such reports as may be reasonably necessary". With respect to reports required for (1) basic comparability reporting, (2) distribution of Title I funds among participating agencies, (3) state performance, and (4) financial status, the Commissioner has developed reporting forms that SEAs must complete and submit. The reporting forms are clear and concise and generally appear to elicit information needed by the Commissioner to perform the OE functions required by Title I. For this reason, we will neither analyze nor make recommendations concerning these reports.

However, the federal legal framework governing the annual SEA evaluation report and complaint resolution lacks clarity.

The issue of the annual SEA evaluation report is considered in the context of Chapter 8 on SEA Evaluation, and will not be analyzed further here. The federal and state legal frameworks for complaint resolution will, however, be described and analyzed in the following section. In addition, recommendations flowing from this analysis will be set forth.

B. Complaint Resolution

1. The Federal Legal Framework

As part of its responsibility to submit "periodic reports" and "such other reports as may be reasonably necessary" to the Commissioner, the SEA is required to submit a report which includes

> a disclosure of any allegations of substance which may be made by [LEAs] or private individuals or organizations of actions by [SEAs or LEAs] contrary to [the Title I Act or regulations], a summary of the result of any investigations made or hearings held with respect to those allegations, and a statement of the disposition by the [SEA] of these allegations. 587/

587/ 45 C.F.R. §116.31(g)(1975).

The regulations governing complaint resolution also emphasize that the responsibility for the resolution of "such matters, rests in the first instance in the [SEA]."[588] As previously mentioned, OE has developed a reporting form which SEAs are required to use to report complaint resolution activities. However, both the regulations requiring this report and the report form itself are silent about a range of issues related to complaint resolution. For example, they do not address OE's ultimate responsibility for insuring the resolution of complaints concerning the operation of Title I programs. This may be especially important where the SEA is investigating a complaint filed about the SEA.

The SEA is not expressly required to develop or disseminate procedures for complaint resolution. No hearing is required; nor is an on-site investigation by SEA personnel mentioned. Furthermore, neither the regulations nor the report form indicate that there are any time limits for the resolution of complaints or that the complainant must receive any communication from the SEA about the status or disposition of the complaint.

The regulations in effect during the state interviews did require SEAs to determine from a review of LEA applications that LEAs had "adequate procedures to insure prompt response to complaints and suggestions from parents and parent council [sic]."[589] However, the regulations did not set forth minimum standards for the content of such LEA procedures. Nor did they describe the relationship between a LEA's and a SEA's complaint resolution responsibilities.

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[588] *Id*.

2. The State Legal Framework

Because of the possible relationship between a LEA's "adequate procedures to insure prompt response to complaints and suggestions from parents and parent council" and a SEA's responsibility "in the first instance" to resolve complaints, we reviewed interpretations of both the LEAs and the SEAs responsibilities.

With respect to LEA procedures, we found that in approximately half the states, this requirement is interpreted as _not_ requiring the existence of written procedures. In the remaining states, it is required that written procedures either be kept on file at the LEA or filed with the SEA area staff.

One state has established through regulations a grievance procedure which applies to all LEAs in the state. The procedure is set forth below.

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[589] 45 C.F.R. §116.17(o)(2)(vii)(1975).

PAC GRIEVANCE PROCEDURES

> (1) If by vote at a duly constituted meeting the parent advisory council raises doubt as to the effectiveness of a Title I proposal or project, the LEA shall provide a hearing for the council within fifteen (15) days of receipt of written notice from the advisory council chairperson. The LEA or the parent advisory council chairperson shall have the right of appeal to the superintendent of public instruction if the outcome of the local hearing is unsatisfactory. The superintendent shall conduct a hearing within fifteen (15) days of receipt of written notice from the LEA or the parent advisory council chairperson, and the decision of the superintendent shall be final.

With respect to state policies governing the SEAs role in complaint resolution, we found that the lack of clarity in the federal legal framework has led to a wide variety of SEA practices in the area of complaint resolution and reporting. Several SEAs did not have written policies or procedures for complaint resolution or reporting. Two SEA Title I officials indicated that their SEAs did not use the required form, (E-4517) to record complaints. One indicated that the SEA had almost never received any complaints of a "substantive nature." The other indicated that the SEA had not had any complaints worth mentioning. Both SEA Title I officials stated that their SEAs had not submitted complaint reports to OE.

The review of the policies and procedures of those few SEAs that had developed written statements about complaint resolution indicated varying interpretations of the complaint resolution regulations.

One SEA has a written procedure that requires complaints be sent to the Title I State Director, the LEA's superintendent and the appropriate Title I consultants. The procedure also requires that a review team composed of a majority of impartial investigators be established; an on-site investigation initiated; preliminary findings documented; a conference among involved parties held; final review findings consolidated; appropriate action taken; and OE and the parties be notified of the final determination.

Another SEA has a written policy that states:

> The SEA will investigate specific complaints from any source concerning a Title I program and will keep the LEA fully informed of the developments and any action to be taken, in the event that the complaint is justified.

This same SEA has also issued an administrative memorandum to Title I Regional Review Staff which outlines SEA policy with respect to "responding to citizen concerns and requests."

The memorandum establishes three conditions under which SEA staff could meet with citizens concerned about Title I practices: (1) LEA authorities must be informed and invited; (2) the meeting must be open to the public; and (3) the meeting must be held in a public place.

3. Policy Analysis and Recommendations

The new regulations governing complaint resolution and reporting differ in several respects from the regulations in effect during the state interviews. First, the requirement that LEAs develop complaint resolution procedures does not appear in the new regulations. Second, SEAs are now required to develop procedures for investigating complaints alleging violations of Title I, including

> . . .(b) procedures for resolving the complaints of parents and other individuals and organizations including: (1) specific time limits for investigation and resolution of complaints, not normally to exceed 60 days; (2) an opportunity for the complainant to present evidence to the [SEA]; and (3) dissemination of information concerning procedures under this paragraph to interested parties, including parent advisory councils. 590 /

590/ 45 C.F.R. §116.6(b)(1976).

Third, explicit reporting requirements for complaints now require the SEA to report to the Commissioner the disposition of all complaints filed and reviewed pursuant to the complaint procedures required by Section 116.6(b). The regulations provide for interim reports, final reports, and report distribution by stating the following:

> (1) Interim reports. In any case, where the complaint has not been fully investigated and resolved by the expiration of a 60-day period, the State educational agency shall report at that time, the substance of the complaint to the Commissioner along with an explanation of its status;
>
> (2) Final reports. In the case of a complaint which has been fully investigated, the State educational agency shall submit a report to the Commissioner which includes at least:
>
> (i) The substance of any allegation and the name of the individual citizen, private organization or local educational agency making the allegation;
>
> (ii) A statement of the disposition of the complaint by the State educational agency giving the reasons for such disposition.
>
> (3) Copies to be sent. The State educational agency upon sending its report to the Commissioner, shall send copies thereof to the appropriate applicant agency and the complainant.[591]

In some respects the new regulations are an improvement. However, they still fall short of a comprehensive interlocking system of complaint resolution that explicitly describes complaint resolution responsibilities at all three levels of the Title I structure: LEAs, SEAs, and OE.

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[591] 45 C.F.R. §116.7(b)(1976).

The new regulations appear to shift the burden entirely to the SEA level. LEAs are not required to develop procedures to respond promptly to complaints and suggestions from parents and PACs. The proposed Title I regulations issued for comment prior to publication of the new regulations would have continued this requirement. Sec. 116a.25(g)(6) of the proposed regulations required LEA applications to demonstrate that the LEA

> has adequate procedures to insure prompt response to complaints and suggestions from parents and the parent councils 592 /

In their response to comments preceding the text of the new regulations, OE stated that

> subparagraph (b)(6), as proposed, has been deleted and relevant complaint procedures are now included in Sec. 116.6 . . . 593 /

However, the new Sec. 116.6 imposes no complaint handling procedures upon LEAs, but is concerned only with states. The elimination of the requirement that LEAs have complaint procedures may mean that parents and parent councils will have to seek relief at the state level.

592/ 40 F.R. 11485 (March 11, 1975).

593/ 41 F.R. 42901 (September 28, 1976).

At the state level, the new regulations require SEA procedures establishing (1) specific time limits for investigation and resolution (not normally to exceed 60 days); (2) an opportunity for the complainant to present evidence to the SEA; and (3) dissemination of information concerning procedures to interested parties, including PACs. However, the new regulations do not require an impartial investigator in the event of a complaint about the SEA, nor do they expressly provide for a hearing or for an on-site visit by the SEA investigator. In addition, they do not provide for a right to appeal the final disposition of the complaint to OE.

The new regulations are generally silent about the role of OE in complaint resolution. All that they require is that OE receive a copy of interim or final complaint disposition reports. There are no express oversight responsibilities imposed on OE. OE is not required to scrutinize complaint reports to determine if there has been compliance with Title I requirements, and intervene if there has been no such compliance. In addition, there is no way that OE can determine from a review of a SEA application or annual program plan whether an SEA has in fact developed the required procedures.

These are serious defects in the new regulations governing complaint resolution. The review of the state legal framework for complaint resolution indicates that where important issues have not been addressed by the federal regulations, practices diverse in quality and comprehensiveness result. Two SEA Title I officials admitted that they did not even submit complaint resolution reports. Other SEAs never developed procedures for complaint resolution.

Based on the analysis of the state legal framework and the new regulations for complaint resolution, the Legal Standards Project has concluded that the new regulations should be amended to clarify the respective roles of the LEA, SEA and OE, and to strengthen the complaint resolution requirements.

We recommend that the Title I regulations be amended to impose specific complaint resolution responsibilities on each level of the Title I administrative structure, i.e., LEAs, SEAs, and OE. Set forth below are recommendations for interlocking complaint resolution procedures at each of these levels.

LEA COMPLAINT RESOLUTION

We recommend that the Title I regulations be amended to require LEAs to develop written procedures for investigating complaints alleging violations of Title I or GEPA, including procedures for resolving the complaints of parents and other individuals and organizations. Such written procedures shall contain, at a minimum:

> (a) the identification by name, title, address, and telephone number of the local official(s) responsible for investigating and resolving complaints;
>
> (b) specific time limits for investigation and resolution of complaints, not normally to exceed 30 days;
>
> (c) an opportunity for the complainant to present evidence to the LEA;
>
> (d) a provision for keeping all correspondence or other written communications concerning the complaint in a central file, accessible to all parties;
>
> (e) a requirement that the complainant, the district and appropriate school advisory council(s) be notified in writing by the LEA within ten days of the resolution of the complaint; the reasons for the decision shall be in writing;
>
> (f) the right to appeal the final resolution of the LEA to the SEA within thirty days of receipt of the written LEA decision;
>
> (g) the dissemination, free of charge, of information concerning these procedures to interested parties, including all district and school advisory councils.

In addition, we recommend that complaint resolution reporting requirements not be imposed on LEAs because those complainants aggrieved by the resolution of the LEA have the right to appeal to the SEA.

SEA COMPLAINT RESOLUTION

We recommend that the Title I regulations be amended to require the SEA to develop written procedures for (1) reviewing appeals from the final complaint resolution decision of a LEA and (2) if necessary, conducting an independent investigation of the complaint alleging violations of Title I or GEPA. Such written procedures shall contain, at a minimum:

> (a) the identification by name, title, address and telephone number of the SEA official(s) responsible for reviewing appeals from the final complaint resolution decision of a LEA and for conducting, if necessary, an independent investigation of the complaint;
>
> (b) specific time limits for completing the review and, if necessary, the independent investigation, not normally to exceed 60 days;
>
> (c) an opportunity for the complainant and the LEA to present evidence to the SEA;
>
> (d) a provision for keeping all correspondence or other written communications concerning the complaint in a central file, accessible to all parties;
>
> (e) a requirement that the complainant, the LEA, the district and appropriate school advisory council(s) be notified in writing by the SEA within ten days of the resolution of the appeal; the reasons for the decision shall be in writing;
>
> (f) the right to appeal the final resolution of the SEA to OE within thirty days of receipt of the written SEA decision; and
>
> (g) dissemination, free of charge, of information concerning these procedures to interested parties, including all district and school advisory councils.

We also recommend that the reporting requirements imposed on SEAs by Sec. 116.6(b) of the new regulations be retained in their present form.

OE COMPLAINT RESOLUTION

We recommend that the Title I regulations be amended to require the Commissioner to develop written procedures for (1) reviewing appeals from the final complaint resolution decision of a SEA and (2), if necessary, conducting an independent investigation of the complaint alleging violations of Title I or GEPA. Such written procedures shall contain, at a minimum:

> (a) the identification by name, title, address and telephone number of the OE official(s) responsible for reviewing appeals from the final complaint resolution decision of a SEA and for conducting, if necessary, an independent investigation of the complaint;
>
> (b) specific time limits for completing the review and, if necessary, the independent investigation, not normally to exceed 60 days;
>
> (c) an opportunity for the complainant, the LEA, and the SEA to present evidence to OE;
>
> (d) a provision for keeping all correspondence or other written communications concerning the complaint in a central file, accessible to all parties;
>
> (e) a requirement that the complainant, the LEA, the SEA, and the district and appropriate school advisory council(s) be notified in writing by OE within ten days of the resolution of the appeal; the reason for the decision shall be in writing; and
>
> (f) dissemination through the Program Directive system of information concerning these procedures.